COMMENTARIES

ON THE

LAW OF PARTNERSHIP,

AS A BRANCH OF

COMMERCIAL AND MARITIME JURISPRUDENCE,

WITH

OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW.

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"In Societatis Contractibus Fides exuberet." — Cod. Lib. 4, tit. 37, l. 3.

"Semper enim, non id, quod privatim interest unius ex Sociis, servari solet, sed quod Societati expedit." — *Dig.* Lib. 17, tit. 2, l. 65, s. 5.

"Gaudeo nostra jura ad naturam accommodari; Majorumque Sapientia admodum delector." — *Cic. de Legibus*, Lib. 2, ch. 25.

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PREFACE TO THE FIFTH EDITION.

In the preparation of this edition, all the recent English and American cases, accessible to the editor, have been examined and cited. Numerous additions to the text, and also to the notes, have been made, which are in all instances included in brackets, thus [ ], to distinguish them from the original work. Sueh new matter has been woven into the original text, rather than stated at more length by way of a note, both for the sake of brevity and convenience. Several hundred new cases have been added, with such explanations and illustrations as seemed requisite.

EDMUND HASTINGS BENNETT.

Boston, April, 1859.



TO THE HONORABLE

SAMUEL PUTNAM, LL. D.

ONE OF THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SIR:

IT is with great satisfaction that I dedicate this work to you. It is devoted to the exposition of a branch of that great System of Commercial Law, which constituted a favorite study in your early professional life, and which, since your elevation to the Bench, you have administered with eminent ability and success. No one, therefore, is better qualified than yourself, to appreciate the importance and difficulty of such a task, and the indulgent consideration, to which even an imperfect execution of it may be fairly entitled. But I desire, also, that this Dedication may be deemed, on my part, a voluntary tribute of respect to your personal character, adorned, as it is, by the virtues, which support, and the refinements, which grace the unsullied dignity of private life. I recollect with pride and pleasure, that I was your pupil in the close of my preparatory studies for the Bar; and, even at this distance of time I entertain the most lively gratitude for the various instruction, ready aid, and uniform kindness, by which you smoothed the rugged paths of juridical learning, in mastering which, an American student might then well feel no little discourage-

ment, since his own country scarcely afforded any means, either by elementary Treatises or Reports, to assist him in ascertaining what portion of the Common Law was here in force, and how far it had been modified by local usages, or by municipal institutions, or by positive laws.

I trust that you may live many years to enjoy the honors of your present high station; and I may be allowed to add, that, out of the circle of your own immediate family, no one will be more gratified than myself, in continuing to be a witness of the increasing favor, with which your judicial labors are received by the public, and of your possession of that solid popularity, which (to use the significant language of Lord Mansfield) follows, and is not run after, in the steady administration of civil justice.

I am, with the highest respect, truly

Your obliged friend,

JOSEPH STORY.

CAMBRIDGE, MASSACHUSETTS,

November, 1841.

PREFACE

In offering another volume of the series of my professional labors to the indulgent consideration of the Profession, I desire to say a few words in explanation of the plan and its execution. The subject is one confessedly of a complicated nature, containing many details, and not unattended with difficulties in its exposition, sometimes from the character of the abstruse and subtile doctrines belonging to it, and sometimes from the occasional conflict, more or less direct, of various adjudications to be found in English and American Jurisprudence. I have endeavored, as far as I could, to ascertain and state the true result of the authorities, and the reasoning, by which they are respectively supported; and I have added explanatory commentaries, sometimes briefly in the text, but in general more largely and critically in the notes, in order to assist the student in his inquiries, and to aid the younger members of the Profession, who may be desirous of extending their researches beyond the boundaries of their own limited libraries. I have not hesitated, upon important occasions, to make large extracts in the notes from the opinions of eminent Judges and elementary writers, believing, that it is the most effectual mode of making the reasoning, upon which particular doctrines are founded, as well as the learning, by which they are supported, more clear, exact

and satisfactory, than the necessary brevity of the text would allow. I trust, also, that I shall not be deemed to have misused the privilege of a commentator, by occasionally questioning, in the notes, the authority of a particular case, or the soundness of a particular doctrine, or by suggesting the importance of a more critical inquiry into the true bearing and value thereof. Unambitious, and even facile and superficial, as this portion of my labors may seem, it has been attended with much embarrassment and exhaustion of time and thought; far more, indeed, than a careless observer might suppose could properly belong to it.

I have in the present, as in my former works, endeavored to illustrate the principles of our jurisprudence by a comparison of it with the leading doctrines of the Roman Law, and with those of the systems of the modern commercial States of Continental Europe, and especially with that of France, which may fairly be deemed to represent and embody the main principles of all the others in a precise and elaborate form. Pothier and Valin, among the earlier Jurists, and Pardessus, Boulay-Paty, Duranton, and Duvergier, among the later Jurists, in their Comments upon the Civil and Commercial Codes of France, have furnished many highly useful materials. Mr. Bell's excellent Commentaries upon the Commercial Law of Scotland are at once learned, comprehensive, and exhausting, and have afforded me very great assistance. I have also freely used the able Treatises of Mr. Watson, Mr. Gow, and Mr. Collyer on the subject of Partnership, and have everywhere cited the pages of the latest editions of their works in the margin, so that the learned reader may have the means of verifying the citations, and of extending his own researches by the further lights afforded by the diligence of these accom-

plished authors. Mr. Chancellor Kent's Commentaries have upon this, as upon all other occasions, been diligently consulted by me; and I need scarcely add, that they have never failed to instruct me, as well as to lighten my labors.

The Roman Law is an inexhaustible treasure of various and valuable learning; and the principles applicable to the Law of Partnership are stated with uncommon clearness and force in the leading title of the Institutes (De Societate), and those of the Digest and the Code of Justinian (Pro Socio), and in the very able Commentaries of Vinnius, Heineccius, and John Voet thereon. A slight glance at them will at once show the true origin and basis of many of the general doctrines, incorporated into the modern jurisprudence of Continental Europe, as well as into that of the Common Law. Indeed, it would be matter of surprise, if the Roman Law, which may be truly said to be the production of the aggregate wisdom and experience of the most eminent Jurists of a vast Empire, did not, upon this subject, abound with principles, not only founded in natural justice, but well adapted to the convenience and policy of commercial nations in all ages. It is curious to observe, how distinctly many of these principles may be traced in the early Ordinances of the Maritime States of modern Europe, and especially in that venerable collection of the laws and usages of the sea, the Consolato del Mare.

But, after all, the Law of Partnership owes its present comparative perfection and comprehensive character and enlightened liberality mainly to the learned labors of the English Bar and Bench. America, while it has derived from the parent country all the elements of that law, has

also contributed its own share towards expounding and enlarging them, so as to meet the new exigencies and progressive enterprises of a widely extended international commerce.

CAMBRIDGE, MASSACHUSETTS,
November, 1841.

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LAW OF PARTNERSHIP.

COMMENTARIES

ON

PARTNERSHIP.

CHAPTER I.

PARTNERSHIP — WHAT CONSTITUTES.

§ 1. HAVING completed our Review of the Law of Agency, we are naturally conducted, in the next place, to the consideration of the Law of Partnership; for every Partner is an agent of the Partnership; and *his rights, powers, duties, and obligations, are in many respects governed by the same rules and principles, as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners he may as properly be deemed an agent.[1] The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business

[1] Baring *v.* Lyman, 1 Story, R. 371.

and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers Partnership, as but a species of mandate, saying: *Contractus societatis, non secus ac contractus mandati.*[1]

§ 2. Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding, that there shall be a communion of the profits thereof between them.[2] Puffendorf has given a definition substantially the same. *Contractus societatis est, quo duo plures ve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur.*[3] Pothier says, that partnership is a contract, whereby two or more persons put, or contract to put, something in common to make a lawful profit in common, and reciprocally engage with each other to render an account thereof:[4] or, as he has expressed it in another place, *Societas est contractus de conferendis bonâ fide rebus aut operis, animo lucri, quod honestum sit ac licitum in commune faciendi.*[5] Domat says, that partnership is a contract between two or more persons, by which they join in common either their whole substance or a part of it, or unite in carrying on some commerce, or some work, or some other

[1] Pothier, Pand. Lib. 17, tit. 2, Introd.

[2] 3 Kent, Comm. Lect. 43, p. 23, 24, 4th edit.; Watson on Partnership, p. 1, 2d edit.; Gow on Partn. p. 1, 3d edit.; Collyer on Partn. B. 1, ch. 1, p. 2, 2d edit.; Montague on Partn. B. 1, Pt. 1, p. 1, 2d edit.; Noyes *v.* Cushman, 25 Verm. 390.

[3] Puffend. Law of Nat. and Nat. B. 5, ch. 8, § 1; Watson on Partn. p. 2, 2d edit.; Gow on Partn. ch. 1, p. 1, 3d edit.; Waugh *v.* Carver, 2 H. Bl. 235, 246.

[4] Pothier, De Société, art. prelim. n. 1.

[5] Pothier, Pand. Lib. 17, tit. 2.

business, that they may share among them all the profit or loss, which they may have by the joint stock, which they have put into partnership.[1] Vinnius says: *Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia.*[2] The Civil Code of France defines it thus: Partnership is a contract, by which two or more persons agree to put something in common, with a view of dividing the benefit, which may result from it.[3] Language nearly equivalent has been adopted by many other foreign writers.[4]

§ 3. Let us consider some of the more important ingredients, which are involved in this definition or description of partnership, and may be said to constitute its essence. In the first place, it is founded in the voluntary contract of the parties, as contradistinguished from the relations, which may arise between the parties by mere operation of law, independent of such contract.[5] Vinnius on this point says: *Societas est consortium voluntarium; nisi enim consensu et tractatu de ea re habito communio suscepta sit, non est societas.*[6] There are many cases in which a community of interest is created by law between parties, as, for example, in cases of joint

[1] Domat, Civ. Law, B. 1, tit. 8, § 1, art. prelim.

[2] Vinn. ad Inst. Lib. 3, tit. 26, Introd.

[3] Code Civil of France, art. 1832.

[4] J. Voet, Comm. Lib. 17, tit. 2, § 1; Ersk. Inst. B. 3, tit. 3, § 18; Tapia, Elementos de Jurisp. Mercantil. p. 86, § 1, edit. Madrid, 1829; Duvergier, Droit Civil Franc. Tom. 5, tit. 9; Contr. de Societé, ch. 1, n. 17, p. 31, 32; Persil, Des Societes, Comm. n. 2, p. 6, 7; 2 Bell, Comm. B. 7, p. 611, 5th edit.; Pardessus, Droit Comm. Vol. 4, art. 966; Van Leeuwen's Comm. ch. 23, § 1; Asso & Manuel, Instit. of Laws of Spain, B. 2, tit. 15.

[5] Pardessus, Droit Comm. Vol. 4, art. 969, 973; Duvergier de Societé, Vol. 5, n. 33, 39, 40, 65; Duranton, Droit Franc. Liv. 3, tit. 9, Vol. 17, art. 320; Collyer on Partn. B. 1, ch. 1, § 1, p. 4, 2d edit.; Watson on Partn. ch. 1, p. 5, 6, 2d edit.; Id. 27.

[6] Vinn. ad Inst. Lib. 3, tit. 26, Introd.

tenancy or tenancy in common in lands, or goods, or chattels, under devises and bequests in last wills and testaments, and deeds and donations *inter vivos*, and inheritances and successions. But no partnership arises therefrom; for they are not strictly founded in contract, although they may exist by the original or subsequent consent of the parties, who receive the benefit thereof.[1] It has been well said by Pothier, that partnership and community are not the same thing. *La societe et la communauté ne sont pas le meme chose.*[2] The first is founded upon the contract of the parties, which thus creates the community; the last may exist independent of any contract whatsoever. And Pothier goes on to illustrate the distinction by putting the cases of joint heirs and joint legatees, where there is a community of interest, but there is no partnership.[3] Another illustration may be seen in the case of the part-owners of a ship, who are treated as tenants in common thereof, each having a distinct although an undivided interest in the whole. They thus may properly be said to have an undivided interest in the ship; and yet that interest does not make them partners.[4] So, if two joint owners of the merchandise should consign it for sale abroad to the

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[1] See 2 Black. Comm. 180 to 188; Id. 399, 400; Comm. Dig. *Estates*, K. 1, K. 6; Story on Agency, § 39; Watson on Partn. ch. 1, p. 5, 6, 2d edit.; 3 Kent, Comm. Lect. 43, p. 25, 4th edit.

[2] Pothier, De Societé, n. 2. See Duvergier, De Societé, Vol. 5, n. 33, 34, 35, 40; Pardessus, Droit Comm. Vol. 4, art. 969; Duranton, Droit Franc. Vol. 17, art. 320.

[3] Pothier, De Societé, n. 2, n. 182, 183, 184; Voet, ad Pand. Lib. 17, tit. 2, n. 2, Tom. 1, p. 748.

[4] Abbott on Shipp. Pt. 1, ch. 3, p. 68, edit. 1829; Watson on Partn. ch. 1, p. 5, 6; Id. ch. 2, p. 67, 2d edit.; 3 Kent, Comm. Lect. 43, p. 25, 4th edit.; Ersk. Inst. B. 3, tit. 3, § 18; 2 Bell, Comm. p. 655, 5th edit.; 1 Stair, Inst. B. 1, tit. 16, § 1, p. 156; Porter *v.* McClure, 15 Wend. 187. Noyes *v.* Cushman, 25 Verm. 390.

same consignee, giving him separate instructions, each for his own share, their interests are several, and they are not to be treated as partners in the adventure.[1] [So, where two persons agree to divide the profit and loss upon the purchases and sales of certain articles of merchandise, each person to make his own purchases and sales, and entirely with his own funds, and in his own name, they are not partners either to third persons, or *inter sese*.[2]] The same result takes place, where a purchase is made for several distinct persons by a broker or other agent of certain goods, each being to take a certain portion, or quantity, but they are not to be sold for their joint account or profit. In such a case no partnership exists, although there is a community of interest in the goods purchased.[3] In short, every partnership is founded in a community of interest; but every community of interest does not constitute a partnership; or, as Duranton expresses it: *La société aussi produit une communauté; en un mot, toute société est bien une communauté; mais toute communauté n'est point une société. Il faut pour cela la volonté des parties.*[4]

§ 4. The Roman Law has recognized the same distinction: *Ut sit pro socio actio, societatem intercedere oportet; nec enim sufficit rem esse communem, nisi societas intercedit. Communiter autem res agi potest etiam citra societatem; ut puta, cum non affectione societatis incidimus in communionem, ut evenit in re duobus legatâ; item si à duobus simul empta res sit; aut si hæreditas vel donatio communiter nobis obvenit;*

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[1] Hall v. Leigh, 8 Cranch, 50; Jackson v. Robinson, 3 Mason, R. 138.

[2] Smith v. Wright, 5 Sandf. 113. And see Pattison v. Blanchard, 1 Selden, 186.

[3] Hoare v. Dawes, Doug. R. 371; Coope v. Eyre, 1 H. Black. 37; 3 Kent, Comm. Lect. 43, p. 25, 4th edit.; Gibson v. Lupton, 9 Bing. R. 297; Holmes v. Unit. Insur. Co. 2 Johns. Cas. 329, 331.

[4] Duranton, Droit Franc. Vol. 47, art. 320; Pothier, De Societé, n. 2.

aut si a duobus separatim emimus partes eorum, non socii futuri.[1] *Nam cum tractatu habito societas coïta est, pro socio actio est; cum sine tractatu in re ipsa et negotio, communiter gestum videtur.*[2] And again: *Qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longé remotum est.*[3]

§ 5. Hence it is an established principle of the common law, that as a partnership can commence only by the voluntary contract of the parties; so, when it is once formed, no third person can be afterwards introduced into the firm, as a partner, without the concurrence of all the partners, who compose the original firm. [But if the term of the partnership has expired, the interest of one partner therein may be assigned to a stranger, and such assignee may maintain a bill for an account against the other partners.[4]] It is not sufficient to constitute the new relation, that one or more of the firm shall have assented to his introduction; for the dissent of a single partner will exclude him, since it would, in effect, otherwise amount to a right of one or more of the partners to change the nature, and terms, and obligations of the original contract, and to take away the *delectus personæ*, which is essential to the constitution of a partnership.[5] So stubborn indeed is this rule, that even the executors

[1] Dig. Lib. 17, tit. 2, l. 31; Pothier, Pand. Lib. 17, tit. 2, n. 30; Vinn. ad Inst. Lib. 3, tit. 26, Introd.

[2] Dig. Lib. 17, tit. 2, l. 32; Pothier, Pand. Lib. 17, tit. 2, n. 30. See also 1 Swanst. R. 509, note (a).

[3] Dig. Lib. 18, tit. 2, l. 33.

[4] Mathewson *v.* Clark, 6 How. S. C. R. 122.

[5] Collyer on Partn. B. 1, ch. 1, § 1, p. 4, 5, 2d edit.; Ex parte Barrow, 2 Rose, Cas. 252, 255; Crawshay *v.* Maule, 1 Swanst. R. 508, 509, and the learned note of the Reporter, n. (a), p. 509; Putnam *v.* Wise, 1 Hill, N. Y. Rep. 234.

and other personal representatives of a partner do not, in that capacity, succeed to the state and condition of that partner.[1] The Roman law is direct to the same purpose. *Qui admittitur socius, ei tantum socius est, qui admisit; et recte; cum enim societas consensu contrahitur, socius mihi esse non potest, quem ego socium esse nolui. Quid ergo, si socius meus cum admisit? Ei soli socius est.*[2] It even pressed the rule to a still further extent, and held, that a positive stipulation between the partners at the commencement of the partnership, that the heir or personal representative of a partner should succeed him in the partnership, was inoperative and incapable of being enforced. *Adeo morte socii solvitur societas, ut nec ab initio pascisci possumus, ut hæres succedat societati.*[3] *Nemo potest societatem hæredi suo sic parere, ut ipse hæres socius sit.*[4] The common law, however, treats such a stipulation as valid and obligatory.[5] This also, according to Pothier, was the doctrine of the old French law;[6] and the modern code of France has expressly adopted it, in opposition to the Roman law.[7] Such also is the law of Scotland.[8]

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[1] Ibid.

[2] Dig. Lib. 17, tit. 2, l. 19; Pothier, Pand. Lib. 17, tit. 2, n. 28; 1 Domat, B. 1, tit. 8, § 2, art. 5; Pothier, de Societé, n. 145. See 1 Swanst. R. 509, note (a).

[3] Dig. Lib. 17, tit. 2, l. 59; Pothier, Pand. Lib. 17, tit. 2, n. 56; 1 Domat, B. 1, tit. 8, § 2, art. 4.

[4] Dig. Lib. 17, tit. 2, l. 35; Pothier, Pand. Lib. 17, tit. 2, n. 35; 1 Domat, B. 1, tit. 8, § 2, art. 4.

[5] Collyer on Partn. B. 1, ch. 1, § 1, p. 5, 6, 2d edit.; 2 Bell, Comm. p. 634, 5th edit.

[6] Pothier, de Societé, n. 145.

[7] Locré, Esprit du Code de Comm. Vol. 1, tit. 3, art. 18, n. 3, p. 106; Code Civil of France, art. 1868; Duranton, Cours de Droit Franc. Tom. 17, De Societé, n. 471; Duvergier, Droit Civil Franc. de Societé, Tom. 5, n. 433, 444.

[8] 2 Bell, Comm. 620, 5th edit.

§ 6. It is also upon the like ground, that partnership is a contract founded purely upon the consent of the parties, that jurists are accustomed to attach to it the ordinary incidents and attributes of contracts. It is accordingly treated by them, as in its very nature and character a contract arising from and governed by the principles of natural law and justice. Accordingly it must, in the first place, be founded in good faith and the positive consent of the parties; secondly, it must be for a lawful object and purpose; and thirdly, it must be between parties *sui juris* and competent to enter into such a contract. John Voet therefore affirms: *Societas est contractus juris gentium, bonæ fidei, consensu constans, super re honestâ, de lucri et damni communione; quam inire possunt omnes liberam habentes rerum suarum administrationem.*[1] Hence, if the contract be founded in fraud or imposition, either upon one of the parties, or upon third persons, it is utterly void.[2] And on this point the Roman law speaks the general sense of nations. *Societas, si dolo malo, aut fraudandi causa coïta sit, ipso jure nullius momenti est; quia fides bona contraria est fraudi et dolo.*[3] And again: *Quia nec societas, aut mandatum flagitiosæ rei, ullas vires habet.*[4] The same rule applies to cases, where the partnership is for immoral or illegal purposes,[5] or is in contravention of the positive law,[6] or of the public policy of the country. Thus, if the partner-

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[1] 1 Voet, Comm. ad Dig. Lib. 17, tit. 2, § 1. See also Pothier, De Societé, n. 4.

[2] 1 Story on Eq. Jurisp. § 222 to 240.

[3] Dig. Lib. 17, tit. 2, l. 3, § 3; Pothier, Pand. Lib. 17, tit. 2, n. 1.

[4] Dig. Lib. 18, tit. 1, l. 35, § 2; Pothier, Pand. Lib. 18, tit. 1, n. 15; Id. Lib. 17, tit. 2, n. 5; Voet, ad Pand. Lib. 17, tit. 2, n. 7, Tom. 1, p. 750.

[5] See McPherson *v.* Pemberton, 1 Jones (N. C.), 378.

[6] Gordon *v.* Howden, 12 Cl. & Finn. 237.

ship be for illegal gaming,[1] or illegal insurances, or wagers, or to carry on contraband trade, or to support a house of ill-fame or debauchery; in these and the like cases, the contract will be deemed a mere nullity, and is equally denounced, as such, by the Roman law, and the foreign law, and the common law.[2] The Roman law is very expressive on this point. *Nec enim ulla societas maleficiorum, vel communicatio justa damni ex malificio est.*[3] Again: *Quod autem ex furto vel ex alio malificio quæsitum est, in societatam non oportere conferri, palam est; quia delictorum turpis atque fœda communio est.*[4]

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[1] See Watson *v.* Fletcher, 7 Gratt. 1.

[2] Gow on Partn. ch. 1, p. 4, 5, edit. 1837; Collyer on Partn. B. 1, ch. 1, § 1, p. 29 to p. 54, 2d edit.; Watson on Partn. ch. 1, p. 35 to p. 46; 3 Kent, Comm. Lect. 43, p. 28; Pothier, De Societé, n. 14; Story on Conflict of Laws, § 244 to 260; 1 Bell, Comm. p. 297 to 306, 5th edit.; Code Civil of France, art. 1833; Duranton, Droit Civil Franc. De Societé, Tom. 17, tit. 9, ch. 1, § 1, n. 327; Duvergier, Droit Civil Franc. Tom. 5, tit. 9, De Societé, ch. 1, n. 24, 25.

[3] Dig. Lib. 27, tit. 3, l. 1, § 14; Pothier, Pand. Lib. 17, tit. 2, n. 5.

[4] Dig. Lib. 17, tit. 2, l. 53; Pothier, Pand. Lib. 17, tit. 2, n. 18.

CHAPTER II.

WHO MAY BE PARTNERS.

§ 7. In the next place, as to the persons who are capable of entering into a partnership. The general rule of the common law is, that every person of sound mind, *sui juris*, and not otherwise restrained by law, may enter into a contract of partnership.[1] As to infants, they are not by the common law incapable of entering into a partnership, since it cannot be universally affirmed, that it may not be for their benefit.[2] And here we have another illustration of the analogy between partnership and other common contracts; for although the contract of partnership by an infant is not absolutely void; yet it is not, on the other hand, positively binding upon him, but is voidable, and may be avoided by him, when he comes of age, according to the known distinction, so well stated by Lord Chief Justice Eyre, that such contracts made by an infant, as the Court may pronounce to be to his prejudice, are merely void; such as are of an uncertain nature as to the benefit or prejudice, are voidable only, and it is at the election of the infant to affirm them or not; and such as are clearly for his benefit (as a contract for necessaries), are valid and obligatory.[3] If an infant,

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[1] Collyer on Partn. B. 1, ch. 1, § 1, p. 8, 2d edit.; Gow on Partn. ch. 1, p. 1, 2, 3d edit. 1837; 1 Story on Eq. Jurisp. § 222 to 239.

[2] See Goode *v.* Harrison, 5 Barn. & Ald. 147, 156 to 159; 1 Story on Eq. Jurisp. § 240 to 243; Dana *v.* Stearns, 2 Cush. 372.

[3] Keane *v.* Boycott, 2 H. Bl. 511, 514, 515; Comyns, Dig. *Enfant*, B. 5,

however, engages in a partnership, he must at or within a reasonable time after his arrival of age notify his disaffirmance thereof, otherwise he will be deemed to have confirmed it, and will be bound by subsequent contracts made on the credit of the partnership. If, upon his arrival of age, he elects to continue the partnership, and does continue it, he will be then held liable as a partner.[1] Indeed, if an infant should hold himself out as a partner during his infancy, although in reality not so, and should not after his arrival of age notify his disaffirmance thereof, he would be liable to third persons, trusting the partnership, to the same extent, as if he were actually a partner; for his conduct would, under such circumstances, amount to a delusion or deceit upon such third persons; and where one or two innocent parties must suffer, he ought to do so, whose negligence or misconduct has occasioned the loss.[2]

§ 8. The like principle will be found recognized in the foreign law. The essence of the contract of partnership, like that of other contracts, consisting in consent, it follows, that if a person is incapable of giving his consent, he is not bound by the contract.[3] And Pothier says, that this rule equally applies to cases of

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6, C. 1, 2, 3, 4, 9; Holmes v. Blogg, 8 Taunt. R. 35; Id. 508; 1 Story on Eq. Jurisp. § 240 to 242; Baylis v. Dineley, 3 Maule & Selw. 477; Lessee of Tucker v. Moreland, 10 Pet. R. 58, 66 to 70; 2 Kent, Comm. Lect. 31, p. 233 to p. 245, 4th edit.

[1] Goode v. Harrison, 5 Barn. & Ald. 147, 156 to 160; Holmes v. Blogg, 8 Taunt. R. 35; Thompson v. Lay, 4 Pick. R. 48; 2 Kent, Comm. Lect. 31, p. 233 to 245; Miller v. Sims, 2 Hill (S. C.), R. 479.

[2] Goode v. Harrison, 5 Barn. & Ald. 147, 152, 157, 158. See also Fitts v. Hall, 9 N. Hamp. R. 441; Bingham on Infancy (Bennett's ed.) and note.

[3] Pothier, Oblig. n. 49 to n. 53.

partnership, as to other cases of contract.[1] Hence persons of unsound mind, or in a state of drunkenness, or under guardianship, or otherwise incapable, as are lunatics, minors, and prodigals, cannot become partners.[2] The French law holds minors and persons under guardianship as rather incapable of binding themselves by contract, than incapable of contracting. They may oblige others to them; although they cannot oblige themselves to others;[3] and so is the doctrine of the Institutes. *Namque placuit meliorem quidem conditionem licere eis facere, etiam sine tutoris auctoritate.*[4] The Scottish law adopts a similar doctrine.[5]

§ 9. As to aliens, there is no doubt, that alien friends may lawfully contract a partnership in one country, although some or all of the partners are resident in another country. But alien enemies are disabled during war from entering into any partnership with each other, as indeed they are from entering into any other commercial contract.[6] A state of hostility puts an end to the rights of commercial intercourse, trade, and business between the respective subjects of the belligerent nations, who are domiciled therein.[7] Nay, the principle goes further, and an antecedent partnership, existing between persons domiciled in different countries, is

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1 Pothier, De Societé, n. 77; Duranton, Droit Franc. Tom. 17, n. 321.

2 Pothier, Oblig. n. 49 to n. 53.

3 Pothier, Oblig. n. 52.

4 Inst. Lib. 1, tit. 21, Introd.

5 2 Bell, Comm. 624, 5th edit.

6 Collyer on Partn. B. 1, ch. 1, p. 9, 2d edit.

7 1 Kent, Comm. Lect. 3, p. 66 to 69, 4th edit.; Potts *v.* Bell, 8 Term R. 548; Willison *v.* Patteson, 7 Taunt. 439; The Indian Chief, 3 Rob. R. 22; The Jonge Pieter, 4 Rob. 79; The Franklin, 6 Rob. 127; Griswold *v.* Waddington, 15 Johns. R. 53; s. c. 16 Johns. R. 438; Ex parte Boussmaker, 13 Ves. 71; The Rapid, 8 Cranch, 155; The Julia, Id. 181; Scholefield *v.* Eichelberger, 7 Peters, R. 580.

dissolved by the breaking out of war between those countries; for the whole rights, duties, obligations, relations, and interests of the partnership, as such, become changed thereby, and the objects of the partnership are no longer legally attainable, or capable of exe cution.[1]

§ 10. As to married women, they are by the common law incapable of forming a partnership, since they are disabled generally to contract, or to engage in trade.[2] It sometimes, however, happens in practice, that, with the consent of their husbands, they become entitled to shares in banking partnerships, and other commercial establishments; but in such cases their husbands are entitled to their shares, and become partners in their stead.[3] There are, however, some exceptions to this rule, even at the common law. Thus, for example, by the custom of London, a married woman is authorized to carry on trade as a *feme sole;* and thence it has been inferred, that she may enter into a partnership in her trade in that city.[4] So, a wife may acquire a separate character and power to contract by the civil death of her husband, as by his exile, banishment, profession, or abjuration of the realm.[5] The

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[1] Griswold v. Waddington, 16 Johns. R. 438. — The masterly judgment of Mr. Chancellor Kent in this case examines and exhausts the whole learning on the subject. See also, 1 Domat, B. 1, tit. 8, § 5. art. 11, 12, 15.

[2] 2 Kent, Comm. Lect. 28, p. 51 to 64.

[3] Gow on Partn. p. 2, 3d edit. 1837; Collyer on Partn. B. 1, ch. 1, § 1, p. 9, 10, 2d edit.; Cosio v. De Bernales, 1 Carr. & Payne, 265; s. c. Ryan & Mood. R. 102; 1 Story, Eq. Jur. § 243; 2 Ibid. § 1367 to 1373; 1 Black. Comm. p. 442 to 444; Watson on Partn. ch. 7, p. 384, 2d edit.

[4] Collyer on Partn. B. 1, ch. 1, § 1, p. 10. See Beard v. Webb, 2 Bos. & Pull. 93; Burke v. Winkle, 2 Serg. & Rawle, R. 189; 2 Roper on Husb. & Wife, ch. 16, § 5, p. 126, 127.

[5] Beard v. Webb, 2 Bos. & Pull. 93, 105; Lean v. Schultz, 2 Wm.

same rule has been applied, where the husband has, in pursuance of a criminal sentence, been transported to foreign parts for a term of years.[1] The ground of these exceptions is, that, by operation of law, the husband is disabled to return; and his matrimonial rights are therefore consequently suspended during his exile, banishment, or transportation.[2] In the cases of abjuration and profession he is treated as *civiliter mortuus.*[3] The same rule has also been applied in England to the case of a woman, the wife of a foreigner, who had never been in England, who was thereby held entitled to contract, and to sue and be sued as a *feme sole.*[4]

§ 11. Such is the doctrine of the common law in respect to married women. But a far more extended rule is adopted in Courts of Equity, where, if the wife possesses or is entitled to any property for her sole and separate use, either by agreement with her husband, or otherwise, she is generally treated, as to such property, as a *feme sole*, and may dispose of the same accordingly, and bind herself by contract touching the same.[5] A

Bl. 1195; 1 Bl. Comm. 443; 2 Roper on Husb. and Wife, ch. 16, § 5, p. 123, 124.

[1] 2 Roper on Husb. & Wife, ch. 16, § 5, p. 123, 124; Sparrow *v.* Carruthers, cited 2 Wm. Black. R. 1197, and in Corbett *v.* Poelnitz, 1 Term R. 6, 7, and in De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 359; Carrell *v.* Blencow, 4 Esp. R. 27; s. c. cited in Boggett *v.* Frier, 11 East, R. 302; Marsh *v.* Hutchinson, 2 Bos. & Pull. 231 to 233; Clancey on Married Women, ch. 4, p. 54 to 56, 63; Co. Litt. 133 *a*, 133 *b*; Gregory *v.* Paul, 15 Mass. R. 31; 2 Kent, Comm. Lect. 28, p. 154 to 164.

[2] Ibid.

[3] Marsh *v.* Hutchinson, 2 Bos. & Pull. 231.

[4] De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 357; Kay *v.* Duchesse de Pienne, 3 Campb. R. 123; Gregory *v.* Paul, 15 Mass. R. 31; Abbott *v.* Bayley, 6 Pick. R. 89.

[5] 2 Story on Eq. Jur. § 1370 to 1402; 2 Kent, Comm. Lect. 28, p. 162 to 172, 4th edit.

full discussion of this topic properly belongs to a treatise on the jurisdiction of Courts of Equity.[1] It may, however, be proper here to state, that if, by an antenuptial or postnuptial agreement for a valuable consideration, the husband contracts to allow his wife to carry on trade for her sole and separate use, if the property is vested in trustees it will be held secure against the husband and his creditors even at law; and, if no trustees are interposed, it will be open to the like protection in equity.[2] If the agreement is voluntary, it will be good, and will be enforced in equity against the husband; but not against his creditors.[3] In like manner, if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade (such as that of a milliner) for her own support, and that of her family, her earnings in that trade will, in equity, be held to belong to her separate use, and be enforced accordingly against the claims of her husband.[4]

§ 12. Although, as we have seen,[5] it has been thought, that a *feme covert*, having authority to carry on trade, as a *feme sole*, by the custom of London, may enter into a partnership in such trade; yet it does not appear ever to have been decided, that the authority of a *feme covert* to carry on trade, as a *feme sole*, arising from the

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[1] 2 Story on Eq. Jur. § 1370 to 1402.

[2] 2 Story on Eq. Jur. § 1385, 1387; 2 Roper on Husb. & Wife, ch. 18, § 4, p. 167 to 175.

[3] 2 Story on Eq. Jur. § 1386, 1387; 2 Roper on Husb. & Wife, ch. 18, § 4, p. 167 to 175.

[4] 2 Story on Eq. Jur. § 1387; 2 Roper on Husb. & Wife, ch. 18, § 4, p. 174, 175; Cecil *v.* Juxon, 1 Atk. 278; Lamplir *v.* Creed, 8 Ves. R. 599; Com. Dig. *Chancery*, 2 M. 11.

[5] Ante, § 10.

consent or agreement of her husband, positively entitles her to engage in a partnership in the trade. If, indeed, the trade cannot otherwise be carried on, either necessarily, or conveniently, or beneficially, his consent to the partnership might, perhaps, be inferred. But the consent of the husband, that his wife may carry on trade for her sole and separate use, does not necessarily import, that she may involve herself in the complex transactions, responsibilities, and duties of partnership. In cases where the law treats the marriage as suspended, and entitles her to act as a *feme sole* (as in cases of banishment, abjuration, or transportation), there may be just ground to presume, that, as she is thereby generally restored to her rights, as a *feme sole*, she may enter into a partnership in trade. But the question never having undergone any direct adjudication, must be deemed still open for discussion and decision.

§ 13. In the Roman law the same positive union and unity of rights and interests between husband and wife are not recognized, which exist under the common law;[1] for in the Roman law, the husband and wife constitute separate and distinct persons, and are separately capable of contracting, under certain limitations and restrictions, with each other, as well as with third persons.[2] Mr. Justice Blackstone has expressed the same doctrine still more broadly, and says: "In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, con-

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[1] 1 Burge on Col. & For. Law, Pt. 1, ch. 7, § 1, p. 263, 261; Pothier, Pand. Lib. 1, tit. 6, n. 9, n. 21.

[2] See 1 Domat, B. 1, tit. 9, § 6, art. 1 to 7; 1 Black. Comm. 444; Ayliffe's Pand. B 2, tit. 6, p. 81, 82; 1 Bro. Civ. & Adm. Law, 82; 1 Burge on Col. & For. Law, B. 1, Pt. 1, ch. 7, § 1, p. 263, 269, 272 to 274.

tracts, debts, and injuries."[1] Hence, the contracts of the husband did not bind the wife, unless she expressly assented thereto. *Frustra disputas* (says the Code) *de contractibus, cum marito tuo habitis, utrumque jure steterint, an minime; tum tibi sufficiat, si proprio nomine nullum contractum habuisti, quo minus pro marito tuo conveniri possis.*[2]

§ 14. In the modern foreign law the same principle has been adopted with various modifications, adapted to local institutions, usages, and policy. The law of Scotland most nearly approaches the English law. Independently of special contract, the husband and wife, by entering into marriage, are joined in the strictest society or partnership, which draws after it a communication of their mutual civil interests, styled, in that law, the communion of goods, and, in the foreign law generally, the property in community. During the marriage, the wife is placed under the direction of the husband, who has, *jure mariti*, the sole authority of administering the property in communion; and so absolute is this right, that he may solely dispose of the property, and it may be attached by his creditors. In consequence of this right and power, the husband becomes liable also to the personal debts of his wife.[3] The wife does not seem entitled to enter into any contract independent of his consent. The law of France recognizes still more extensively the distinct characters and rights of the husband and wife. The husband and wife, independently of any special con-

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1 1 Black. Comm. 444.

2 Cod. Lib. 4, tit. 12, l. 1.

3 Erskine's Inst. B. 1, tit. 6, § 12 to 18; 1 Bell, Comm. 631 to 635, 5th edit.; 1 Burge on Col. & For. Law, Pt. 1, ch. 7, p. 423 to 462.

vention, hold their property in community, and the husband is the sole administrator of the property of the community.[1] The wife can do no act in law without the authority of her husband, even though she shall be a public trader, or not in community, or separate in her property.[2] Hence, she is incapable of contracting without his authority and consent.[3] She cannot become a sole trader without his consent.[4] But if authorized by him to act as a sole trader, she may make herself liable *for all the concerns of her mercantile transactions; and in that case she also renders her husband liable, if there be a community of goods between them.[5] It has thence been supposed, that his consent and authority may extend to a contract of partnership by her in trade.[6] The law of Louisiana coincides with that of France.[7] The law of Holland and of Spain, and probably that also of most of the continental states of Europe, contains provisions, in many respects similar.[8]

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[1] Code Civil of France, art. 1400, 1421.

[2] Code Civil of France, art. 215, 217; Locré, Esprit du Code de Comm. art. 4, p. 27 to 30.

[3] Pothier, Oblig. n. 52.

[4] Locré, Esprit du Code de Comm. tit. 1, art. 4, p. 26 to 29, 36 to 38, 42.

[5] Code of Comm. of France, art. 4, 5; Code Civil of France, art. 220.

[6] Pothier, De Société, n. 77.

[7] Code of Louisiana, 1825, art. 121 to art. 131.

[8] 1 Burge on Col. & For. Law, Pt. 1, ch. 7, § 2, p. 276, 293 to 303; Id. § 4, p. 413, 418 to 423.

CHAPTER III.

PARTNERSHIP BETWEEN THE PARTIES — COMMUNITY OF INTERESTS.

§ 15. IN the next place, every partnership presupposes that there must be something brought into the common stock or fund by each party.[1] But it is not necessary, that each should contribute or contract to contribute money, goods, effects, or other property, towards the common stock; for one may contribute labor or skill, and another may contribute property, and another may contribute money, according as they shall agree.[2] And for this there is good reason; and it is well put in the Roman law: *Plerumque enim tanta est industria socii, ut plus societati conferat, quam pecunia. Item, si solus naviget, si solus peregrinetur, pericula subeat solus.*[3] Sometimes it happens, that each partner contributes only skill or labor, or services for the common benefit; as, for example, housewrights, or shipbuilders, or riggers, who are partners; or commission merchants, brokers, or other agents, whose partnership only extends to the

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[1] 3 Kent, Comm. Lect. 43, p. 24, 25, 4th edit.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 10, 2d edit.; Peacock v. Peacock, 16 Ves. 49; Reid v. Hollinshead, 4 Barn. & Cresw. 878; Meyer v. Sharpe, 5 Taunt. 74; Waugh v. Carver, 2 H. Bl. 235, 246; 2 Bell, Comm. B. 7, ch. 1, p. 614, 5th edit.; 1 Stair, Inst. B. 1, tit. 16, § 2; Domat, B. 1, tit. 8, § 1, art. 7; Dob v. Halsey, 16 John. R. 34; Dale v. Hamilton, 5 Hare, R. 393; Perry v. Butt, 14 Geo. 699.

[3] Dig. Lib. 17, tit. 2, l. 29, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 3; Inst. Lib. 3, tit. 26, § 2; 1 Domat, B. 1, tit. 8, § 1, art. 7.

profits of their business, and who have no capital stock embarked in the enterprise.[1] But all must contribute something; and thus join together either money, or goods, or other property, or labor, or skill;[2] or, as Pothier expresses it: *Il est de l'essence du contrat de societé, que chacune des partiés apporte ou s'oblige d'apporter quelque chose a là societé; ou l'argent, ou d'autres effets, ou son travail, et son industrie.*[3] The Roman law pronounces the same rule: *Societatem, uno pecuniam conferente, alio operam, posse contrahi, magis obtinuit.*[4] And, indeed, it may be said to be universally adopted in modern times.[5]

§ 16. In the next place, from what has been already said,[6] it is apparent, that in every case of partnership there is a community of the property of the partnership between the parties, as soon as it becomes part of the common stock, although it may before that time have exclusively belonged to one or more of them.[7]

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[1] Collyer on Partn. B. 1, ch. 1, § 1, p. 10, 11, 2d edit.; Cheap *v.* Cramond, 4 Barn. & Ald. 663; Waugh *v.* Carver, 2 H. Bl. 235.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 10, 11, 2d edit.; 3 Kent, Comm. Lect. 43, p. 24, 25, 4th edit. — In Waugh *v.* Carver, 2 H. Bl. 235, 246, Lord Chief Justice Eyre said: "A case may be stated, in which it is the clear sense of the parties to the contract, that they shall not contribute; that A. is to contribute neither labor nor money, and to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes as to all the rest of the world a partner."

[3] Pothier, De Societé, n. 8, 9, 10; Pardessus, Droit Comm. Tom. 4, art. 983, 984.

[4] Cod. Lib. 4, tit. 37, l. 1; Pothier, Pand. Lib. 17, tit. 2, n. 2; Inst. Lib. 3, tit. 26, § 2; Vinn. ad Inst. Lib. 3, tit. 26, § 2, n. 3.

[5] See 2 Bell, Comm. B. 7, p. 611, 5th edit.; Pothier, De Societé, n. 8, 9, 10; Vinn. ad Inst. Lib. 3, tit. 26, Introd. p. 693; Domat, B. 1, tit. 8, § 1, art. 7.

[6] Ante, § 3.

[7] 3 Kent, Comm. Lect. 43, p. 24 to 26; Pardessus, Droit Comm. Tom. 4, art. 969 to 972.

In this case, however, it is to be understood, that we are speaking of a partnership, designed to be such between the parties themselves; and not merely of a partnership, which may by construction of law exist as to third persons, although not intended between the parties, of which more will presently be said.[1] Partners, therefore, are to be treated, in a qualified sense, as joint-tenants of the partnership property, having an interest therein *per my et per tout* (as the phrase of our ancient law is), that is, having an interest therein by the half or moiety, and by all, or more accurately speaking, they, each of them, have an interest in, and the entire possession, as well of every parcel, as of the whole.[2]

§ 17. This principle is equally recognized in the foreign law; and indeed seems to result directly from the nature of the contract of partnership, which supposes, that the property brought into it is put into community by the joint consent of the parties. Accordingly Pothier insists upon this as a leading distinction. *La societé est le contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun;*[3] and the same distinction is fully supported by other jurists.[4] Mr. Bell says, that the property of the partnership is common, and held *pro indiviso* by all the partners as a stock and in trust.[5] So Vinnius says: *Ut sit societas, necesse aliquid*

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[1] Waugh *v.* Carver, 2 H. Bl. 235, 246; Hesket *v.* Blanchard, 4 East, R. 144; Cheap *v.* Cramond, 4 Barn. & Ald. 663; Reid *v.* Hollinshead, 4 Barn. & Cressw. 867.

[2] 2 Bl. Comm. 182.

[3] Pothier, de Societé, n. 2; Pothier, Pand. Lib. 17, tit. 2, Introd. to n. 1.

[4] Duvergier, Droit Civ. Franc. Tom. 5, tit. 9, n. 33 to n. 40; Vinn. ad Inst. Lib. 3, tit. 26, p. 693, Introd.

[5] 2 Bell, Comm. B. 7, ch. 1, p. 612, 613, 5th edit.; Stair, Inst. B. 1, ch. 16, § 1.

mutuo conferri et communicari; nisi quid utrinque commune conferatur, societas non intelligitur.[1] The Roman law adopted the same principle. *In societate omnium bonorum omnes res, quæ coëuntium sunt, continuo communicantur.*[2]

§ 18. In the next place, every real partnership, so intended between the parties themselves, imports, *ex vi termini*, a community of interest in the profits of the business of the partnership, that is to say, a joint and mutual interest in the profits thereof, or a communion of profit. And this is of the very essence of the contract; for, without this communion of profit, a partnership cannot, in the contemplation of law, exist.[3] And

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[1] Vinn. ad Inst. B. 3, tit. 26, Introd. p. 693.

[2] Dig. Lib. 17, tit. 2, l. 1; Id. l. 3, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 13, 14; 1 Domat, B. 1, tit. 8, § 1, art. 2.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit.; Pardessus, Droit Comm. Tom. 4, art. 969; Duvergier, Droit Civ. Franc. Tom. 5, tit. 9, n. 11; 3 Kent, Comm. Lect. 43, p. 24, 25, 4th edit.; Watson on Partn. ch. 1, p. 33 to 35; Id. p. 56, 57, 2d edit.; Felichy *v.* Hamilton, 1 Wash. Cir. R. 491; Gow on Partn. ch. 4, p. 153, 154, 3d edit.—Mr. Collyer expresses the doctrine in the following terms. "To constitute a partnership between the partners themselves, there must be a communion of profit between them. A communion of profit implies a communion of loss; for every man, who has a share in the profits of a trade, ought also to bear his share of the loss." Again: "By a communion of profit is intended a joint and mutual interest in profit." Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit. By joint interest, as he afterwards explains, he means a joint interest in the profits arising from the sale of the goods; and by mutual interest, that each party has a specific interest in the profits, *as a principal trader*. Id. p. 11, 17. Mr. Collyer afterwards states a curious case from Select Cases in Chancery (p. 9), where work was jointly undertaken by two persons, and they were to divide the money therefor; and they were held not to be partners. His language is: "Again, upon principles similar to those of the foregoing cases, if two persons jointly agree to do a particular piece of work, but the money received for such work is not to be employed on their joint account, the persons so contracting are not partners. Thus, in the case of Finckle *v.* Stacey (Sel. Ca. Ch. 9), joint articles were entered into by the plaintiff and defendant for doing a particular piece of work for the Duke of Marlborough, on account of which several sums of money had been jointly received by them,

so Pothier has laid down the doctrine. *Il est de l'essence de ce contrat, que le société soit contractée pour l'interet commun des parties.*[1] If the contract be for the sole and exclusive benefit of one party, it is not properly a case of partnership, but must fall under some other denomination, such as a mandate.[2] Hence, if in a pretended contract of partnership, it should be agreed, that one of the parties should take all the profit, without the others having any share thereof, it would be a mere nullity, and constitute no partnership.[3] The Roman jurists

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and immediately divided between them. There being a sum demanded by them in arrear, which the Duke refused to pay, as being unreasonable, Stacey applied to Finckle to join him in a suit to recover what was in arrear; which he refused to do, declaring that he had several advantageous works under the duke, which he should lose should he join in a suit; on which Stacey applied, and got his own half of the sum, which was due to the two. A bill was then brought for a moiety of the money so received; and it was insisted it should be considered as a partnership in trade, and this money as so much received on the joint account. But the court were of opinion it was not to be considered as a partnership, but only an agreement to do a particular act, between which there is great difference; and that it is so is plain, for the money, which they had received, they immediately divided, and did not *lay out on a common account.* The bill was dismissed with costs. Upon this case, however, it is to be observed, that if no application had been made to the plaintiff to sue the duke, a bill for an account, supposing an account necessary, would clearly have been sustainable against the defendant on other grounds, than those of partnership. Here, however, the plaintiff, for his own private ends, had absolutely refused to join in suing for the money; and the court observed: 'It is pretty extraordinary, that he should come here to have the benefit of another's act, in which he refused to join; which refusal was with a corrupt view for his own advantage, and not on a common account, the money due on which he would rather sacrifice than forego his own particular advantage. And here is no insolvency in the duke; if there had been, perhaps it would have deserved consideration.'"

[1] Pothier, De Societé, n. 12.

[2] Pothier, De Societé, n. 12; Waugh *v.* Carver. 2 H. Bl. 235, 246.

[3] Pothier, De Societé, n. 12; 3 Kent, Comm. Lect. 43, p. 29, 30, 4th edit.; Dig. Lib. 17, tit. 2, l. 30; Pothier, Pand. Lib. 17, tit. 2, n. 3; Vinn. ad Inst. Lib. 3, tit. 26, Introd. p. 693; Jestons *v.* Brooke, Cowp. R. 793.—In many

branded such a contract with the odious epithet of *Societas Leonina*, in allusion to the fable of the lion, who, having entered into a partnership with the other wild beasts for hunting, appropriated the whole prey to himself.[1] And the Roman law declared, *Societatem talem coïri non posse, ut alter lucrum tantum, alter damnum sentiret; et hanc Societatem Leoninam solitum appellare. Et nos consentimus talem societatem nullam esse, ut alter lucrum sentiret, alter vero nullum lucrum, sed damnum sentiret; Iniquissimum enim genus Societatis est, ex qua quis damnum, non enim lucrum, spectet.*[2] The modern Code of France has expressly promulgated the same doctrine. It declares, that the contract, which shall give to one of the partners the entirety of the profits, is null.[3] Nay, it has gone further, and added, that it is the same of a stipulation, which shall free from all contribution to losses the moneys or effects brought into the partnership fund by one or more partners.[4]

§ 19. So strong and inflexible is this rule, that it is often laid down in elementary works, as well as in the common law authorities, that to constitute a partnership there must be a communion of profits and losses between the partners.[5] And this in a qualified sense is

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cases of this sort the contract would be treated as a mere cover for usury. Ibid.; Pothier, De Société, n. 22.

[1] Pothier, De Société, n. 12; 3 Kent, Comm. Lect. 43, p. 29, 30.

[2] Dig. Lib. 17, tit. 2, l. 29, § 2; Pothier, Pand. Lib. 17, tit. 2, n. 3; Pothier, De Société, n. 19; Domat, B. 1, tit. 8, § 1, art. 6–10; Id. § 2, art. 12.

[3] Code Civil of France, art. 1855.

[4] Code Civil of France, art. 1855.

[5] See Collyer on Partn. B. 1, ch. 1, § 1, p. 11; Gow on Partn. ch. 1, p. 1, 3d edit.; 3 Kent, Comm. Lect. 34, p. 23, 24; Mont. on Partn. B. 1, Pt. 1, p. 2; Grace *v.* Smith, 2 W. Bl. 998; Watson on Partn. ch. 1, p. 1; Id. p. 56, 2d edit.; Ersk. Inst. B. 3, tit. 3, § 18; 1 Domat, B. 1, tit. 8, § 1, art. 1; Pothier, De Société, n. 19, 20; 1 Stair, Inst. B. 1, tit. 16, § 3; Coope *v.* Eyre, 1 H. Bl. R. 37; Bond *v.* Pittard, 3 Mees. & Welsb. 357, 360; Pardessus,

perfectly true, when it is understood with the proper limitations belonging to the statement. The doctrine will be found in the Roman law. *Societas cum contrahitur, tam lucri quam damni communio initur.*[1] *Sicuti lucrum ita damnum quoque commune esse oportet.*[2] Modern foreign jurists often use expressions to the same effect.[3] The Roman law carried this equitable presumption still further, and declared, that if the partners expressly mentioned their shares in one respect only, either solely as to the profit, or solely as to the loss, their shares of that, which was omitted, should be regulated by what was expressed. *Illud expeditum est, si in unâ causâ pars fuerit expressa, veluti in solo lucro, vel in solo damno, in alterâ vero omissa, in eo quoque, quod prætermissum est, eandem partem servari.*[4] But all this language is to be interpreted in a limited and qualified sense; and so understood, it admits of no real dispute.

§ 20. In the first place, every partnership imports, in the absence of all contrary stipulations, that the profit and loss are to be borne by all the partners, according to their respective proportions thereof.[5] And the question was much discussed in the Roman law, whether a

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Droit Comm. Tom. 4, n. 996; Duvergier, Droit Civ. Franc. Tom. 5, n. 17; Ex parte Langdale, 18 Ves. 300; Green *v.* Beesley, 2 Bing. N. Cas. 112; Dry *v.* Boswell, 1 Campb. R. 330; Hoare *v.* Dawes, Doug. R. 371.

[1] Dig. Lib. 17, tit. 2, l. 67; Pothier, Pand. Lib. 17, tit. 2, n. 38; 1 Domat, B. 1, tit. 8, § 1, art. 1.

[2] Dig. Lib. 17, tit. 2, l. 52, § 4; Pothier, Pand. Lib. 17, tit. 2, n. 39; 1 Domat, B. 1, tit. 8, § 1, art. 1.

[3] Duvergier, Droit Civ. Franc. Tom. 5, tit. 9, n. 13 to n. 18; Pardessus, Droit Comm. Tom. 4, art. 996.

[4] Inst. Lib. 3, tit. 26, § 3; Vinn. ad Inst. Lib. 3, tit. 2, § 3; Domat, B. 1, tit. 8, § 1, art. 5.

[5] Watson on Partn. ch. 1, p. 59, 60, 2d edit.; Collyer on Partn. B. 1, ch. 1, § 2, p. 105, 106, 2d edit.; Voet, ad Pand. Lib. 17, tit. 2, n. 8, Tom. 1, p. 751; Domat, B. 1, tit. 8, § 1, art. 7, 8.

stipulation, that one partner only should bear all the losses, and both should share the profits, was valid or not. It was finally settled, according to the opinion of Servius Sulpitius, that it was valid, and that one partner might, by agreement, be entitled to share in the profits, and not be accountable for any part of the loss.[1] But then every such stipulation was understood to be with this reserve, that the losses were first to be deducted from the profits; and that if profits accrued from one species of things, and losses from another, what remained only after the losses were deducted was to be deemed profits.[2] So that, in fact, each partner in this way, who shared a part of the profits, shared, by deduction from the gross profits, his proportion of the losses also, as far as there were any profits. *Ita coiri societatem posse* (says the Digest), *ut nullius partem damni alter sentiat, lucrum vero commune sit, Cassius putat. Quod ita demum valebit* (*ut et Sabinus scribit*), *si tanti sit opera, quanti damnum est.*[3] And again: *Mucius scribit, non posse societatem coiri, ut aliam damni, alium lucri partem socius ferat. Servius in notatis Mucii ait, nec posse societatem ita contrahi; neque enim lucrum intelligitur, nisi omni damno deducto; neque damnum nisi omni lucro deducto. Sed potest coiri societas ita, ut ejus lucri, quod reliquum in societate sit, omni damno deducto, pars alia feratur; et ejus damni, quod similiter relinquatur, pars alia capiatur.*[4] The Institutes express the same doctrine still more succinctly: *Et adeo, contra Quintii Mutii sententiam obtinuit, ut illud quoque constiterit, posse convenire, ut quis lucri*

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[1] Inst. Lib. 3, tit. 26, § 2; Watson on Partn. ch. 1, p. 56, 57, 2d edit.; Domat, B. 1, tit. 8, § 1, art. 6 to art. 9.

[2] Domat, B. 1, tit. 8, § 1, art. 7, 8.

[3] Dig. Lib. 17, tit. 2, l. 29, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 3.

[4] Dig. Lib. 17, tit. 2, l. 30; Pothier, Pand. Lib. 17, tit. 2, n. 3; Pothier, De Societé, n. 21; Domat, B. 1, tit. 8, § 1, art. 7, 8, 9.

partem ferat, de damno non teneatur. Quod tamen ita intelligi oportet, ut si in aliâ re lucrum, in aliâ damnum illatum sit, compensatione factâ solum quod superest, intelligatur lucro esse.[1]

§ 21. It is in this sense, that the proposition has been generally understood by jurists in modern times, and adopted into the common law; that each partner must at all events share in the losses, so far, at least, as they constitute a charge upon, and diminution or deduction from, the profits; and in this sense it is regularly true.[2]

§ 22. Pothier states this doctrine with uncommon clearness and accuracy. After remarking, that, consistently with equity, it may be agreed between the partners, that one should bear a less proportion, or even no part of the loss of the partnership, he adds, that this is not to be understood in the sense, that one partner is to have a share of the profit of each particular transaction, which shall be advantageous to the partnership, without contributing any thing to the losses, which the partnership may sustain from other transactions, which shall be unprofitable to it; for that would manifestly be unjust. But it is to be understood in this sense, that after the dissolution of the partnership, an account is to be taken of all the profits of the partnership, and a like account of all the losses on all the business undertaken by the partnership; and if the totality of the profits exceeds the totality of the losses, the partner shall take

[1] Inst. Lib. 3, tit. 26, § 2.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit.; Pothier, De Societé, n. 13, 19, 21; Duvergier, Droit Civ. Franc. Tom. 5, n. 13 to n. 18; Id. n. 220 to 222; Bond v. Pittard, 3 Mees. & Wels. 359, 360; Vinn. ad Inst. Lib. 3, tit. 26, § 2; Pardessus, Droit Comm. Tom. 4, n. 996 to 999; 1 Stair, Inst. B. 1, tit. 16, § 3.

his share of the excess. And if, on the contrary, the totality of the losses exceeds that of the profits, the partner shall have neither profit nor loss.[1] And this is in accordance with the Roman law: *Neque enim lucrum intelligitur, nisi omni damno deducto; neque damnum, nisi omni lucro deducto.*[2]

§ 23. Hence it may be laid down, as a general rule of the common law, that, in order to constitute a partnership, it is not essential, that the partners should equally share the profits and losses. It is sufficient, if they are to share in the profits of the business, after a deduction of the losses; or, in other words, that they should share in the net profits according to their respective proportions. It is, therefore, competent for the partners by their stipulations to agree, that the profits shall be divided, and if there be no profits, but a loss, that the loss shall be borne by one or more of the partners exclusively, and that the other shall, *inter sese*, be exempted therefrom.[3] So, the proportion, in which they are to share the profits, or losses, may be varied at their pleasure, whether they contributed equally to the common stock, or not; and the same rule is applicable to the proportions, in which they are to bear the losses.[4] Thus, they may agree, that one or more partners shall take a greater proportion of the profits than the others, and shall, if there be no profits, share a less proportion of the losses, or even be wholly exempted

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[1] Pothier, De Societé, n. 21. See Duvergier, Droit Civ. Franc. Tom. 5, n. 13 to 18.

[2] Dig. Lib. 17, tit. 2, l. 30; Pothier, Pand. Lib. 17, tit. 2, n. 3.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit.; Gow on Partn. ch. 1, p. 9, 3d edit. 1837; Bond *v.* Pittard, 3 Mees. & Wels. 357, 359; Gilpin *v.* Enderby, 5 Barn. & Ald. 954.

[4] Watson on Partn. ch. 1, p. 56, 57, 2d edit.

therefrom.[1] The reason of all this is, that the inequality of skill, of labor, or of experience, which the partners may bring into the particular business, may not only justify, but positively require this inequality of compensation, and of exemption from loss, as a matter of justice and equity between the parties. And the law has, therefore, wisely not prohibited it; but has left it to the parties to exercise their own discretion in these matters, taking care, that no fraud, imposition, or undue advantage is taken of the other side.[2] In fact (as has been well observed by a learned writer), by the common law, the various stipulations and provisions relating to the commencement of the partnership, the manner, in which the business is to be conducted, the space of time, for which the partnership is to endure, the capital, which each is to bring into the trade, the proportion, in which the profits and losses are to be divided, the time and manner agreed upon for settling the accounts, the powers and duties of the partners, in regard to conducting the business, and entering into engagements, which may affect the partnership, the mode, in which the partnership may be dissolved, together with the various covenants adapted to the circumstances of each particular case, are purely and entirely the subject of personal and private agreement and arrangement; and in whatever way they may ultimately be settled,

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[1] Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit.; Gow on Partn. ch. 1, p. 9, 3d edit. 1837; Gilpin *v.* Enderby, 5 Barn. & Ald. 954, 964; Bond *v.* Pittard, 3 Mees. & Wels. 357, 360; Watson on Partn. ch. 1, p. 56, 57, 2d edit.; Fereday *v.* Hordern, Jacob, R. 144.

[2] See Pothier, De Société, n. 18, 19. See also, Duvergier, Droit Civ. Franc. Tom. 5, n. 13 to 18; Pardessus, Droit Comm. Tom. 4, n. 997; Van Leeuwen's Comm. B. 4, ch. 23, § 10.

they cannot be impeached, unless they interfere with, or contravene some rule or principle of law.[1]

§ 24. In the absence, however, of all precise stipulations between the partners, as to their respective shares in the profits and losses, and in the absence of all other controlling evidence and circumstances, the rule of the common law is, that they are to share equally of both; for in such a case equality would seem to be equity.[2] And the circumstance, that each partner has brought an unequal amount of capital into the common stock, or that one or more has brought in the whole capital, and the others have only brought industry, skill, and experience, would not seem to furnish any substantial or decisive ground of difference, as to the distribution. On the contrary, the very silence of the partners, as to any particular stipulation, might seem fairly to import, either, that there was not, all things considered, any real inequality in the benefits to the partnership in the case, or that the matter was waived upon grounds of good-will, or affection, or liberality, or expediency.[3] It is true, that it has sometimes been asserted, that in cases of this sort, there is no natural presumption, that the partners are to share equally; and that it is a matter of fact to be settled by

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[1] Gow on Partn. ch. 1, p. 9, 3d edit. 1837.

[2] Watson on Partn. ch. 1, p. 59, 60, 2d edit.; Collyer on Partn. B. 1, ch. 1, § 2, p. 105, 106, 2d edit.; 3 Kent, Comm. Lect. 43, p. 28, 4th edit.; Roach *v.* Perry, 16 Ill. 37; Donelson *v.* Posey, 13 Ala. 752; Gould *v.* Gould, 6 Wend. R. 263. But see Thompson *v.* Williamson, 7 Bligh, R. 432; s. c. 5 Wilson & Shaw, 16; 2 Moreau & Carl. Partidas, Pt. 5, l. 3, 4, p. 766, 767.

[3] Collyer on Partn. B. 2, ch. 1, § 2, p. 105 to p. 107, 2d edit.; 3 Kent, Comm. Lect. 43, p. 28, 4th edit.; Watson on Partn. ch. 1, p. 56 to p. 60, 2d edit.; Gould *v.* Gould, 6 Wend. R. 263. See Van Leeuwen's Comm. B. 4, ch. 23, § 10.

a jury, or by a court, according to all the circumstances, what would be a reasonable apportionment. Thus, it was held by Lord Ellenborough, that if a father and son should be partners, no presumption would arise, that they were to share in moieties in the absence of all positive stipulations; but, that the shares were to be ascertained by a jury, if the case were at law.[1] But this doctrine was afterwards positively disapproved of by Lord Eldon, who held, that even in the case of a father and son, who are partners, if no distinct shares are ascertained by force of any express contract, they must of necessity be equal partners, and are entitled to moieties.[2] However; it must be still

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[1] Peacock *v.* Peacock, 2 Camp. R. 45.

[2] Peacock *v.* Peacock, 16 Ves. 49, 56; Webster *v.* Bray, 7 Hare, R. 179; Farrar *v.* Beswick, 1 Mood. & Rob. 527; Collyer on Partn. B. 1, ch. 1, § 2, p. 105, 106, 2d edit.; Gow on Partn. ch. 1, p. 8, 9, 3d edit. 1837; 2 Bell, Comm. B. 7, ch. 1, p. 614, 615, 5th edit. — In Farrar *v.* Beswick, 1 Mood. and Rob. 527, Mr. Justice Parke held the same doctrine as Lord Eldon, and said: "Where a partnership is found to exist between persons, but no evidence is given to show in what proportions the parties are interested, it is to be presumed, that they are interested in equal moieties." It is true, that in the case of Thompson *v.* Williamson, 7 Bligh, R. 432; s. c. 5 Wils. & Shaw, 16, a doubt was thrown upon this doctrine, as a doctrine of the common law, by Lord Winford and Lord Brougham; but I cannot think, that it is successfully maintained by the reasoning contained in their opinions. Each of these learned judges admitted on that occasion, that if there is nothing to guide the judgment of the court to give unequal shares, there is no rule for them to go by, but to give in equal shares. What is this but affirming, that in the absence of all controlling circumstances, leading to a different conclusion, the presumption of law is, that the partners are to take in equal shares? But it is not an irresistible presumption; for where there are circumstances, which demonstrate, that the partners in the particular case did in fact intend, or from the general habit and custom of their trade and business, under the like circumstances, must be fairly presumed to have intended to share in a different proportion, there is not the slightest difficulty in admitting, that the presumption of law ought to yield to the presumption of fact, as legally presumptions ordinarily do in other cases. And this is what seems to have

deemed an open question in England, since a recent decision in the House of Lords has questioned, if it has

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been intended by Lord Eldon, in his opinion in Peacock *v.* Peacock, 16 Ves. 49, 56; and was explicitly avowed by Mr. Baron Parke, in Farrar *v.* Beswick, 1 Mood. & Rob. 527. The real difficulty lies in holding, that, where there is an inequality in the stock, or skill, or services, or experience of the different partners, any one or more of those circumstances alone, or in conjunction with other circumstances, equally indeterminate and equivocal, should overcome the ordinary presumption of law of equality of shares between the partners. Now, Lord Ellenborough, in Peacock *v.* Peacock, 2 Camp. R. 45, seems to have acted upon the ground, that, in every such case of inequality, there was no such presumption of law whatever to govern it; but that it was open for the jury to take into consideration all the circumstances, if the suit were at law, or for the court, if the suit were in equity, and to adjudge the proportions, not upon any supposed contract between parties actually established, but as it were ex æquo et bono, as upon a quantum meruit. It was in this view, that Lord Eldon seems to have expressed his disapprobation of the doctrine; because it assumed to overthrow a presumption of law (and it would not have been materially different, if it were a presumption of fact), upon indeterminate circumstances, which might be urged with more or less effect to a jury, but which carried no certainty, as to the positive intent or contract of the parties. His Lordship on that occasion said: "The father employed his son in his business; and, as is frequently done by a father, meaning to introduce his son, the business was carried on in the name of 'Peacock and Co.' It appeared to me, that the son, insisting, that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that, as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in any thing. In that view the result of the issue, that was directed, appears to be extraordinary. The proposition being, that the son was interested in some share, not exceeding a moiety, the jury in some way, upon the footing of quantum meruit, held him entitled to a quarter. I have no conception, how that principle can be applied to a partnership. The parties, however, consider themselves bound by that verdict." If, by the custom of any particular trade or business under the like circumstances, the rule was general to give a fixed proportion, as, for example, a fourth to one partner, and three fourths to another, on account of the inequality of capital, or skill, or experience, or age, or the relation of parent and child, that might properly control the presumption of law; for it would amount to strong presumptive evidence, that the partners intended to contract upon the usual terms. But where there are no such circumstances, and nothing determinate in the evidence, but all rests upon conjecture, at best admitting

not shaken the doctrine of Lord Eldon, and affirmed that of Lord Ellenborough.[1] In America the authori-

of various force and application, what ground is there to presume a contract for a quantum meruit? The more reasonable ground would seem to be, that the parties meant to treat with each other upon a footing of equality, or to waive the inequality, as a matter of liberality, or bounty, or parental or filial affection, or proximity of blood or personal friendship. There seems also to be very great uncertainty in the application of the doctrine; for from such indeterminate and vague circumstances very different conclusions might be drawn by different juries and different courts; and it seems far more convenient to adopt a general rule of interpretation of the intention of the parties, in the absence of any express or implied agreement or usage, as to the apportionment of the profits. Cases may indeed arise, where the presumption fairly would be, that the parties were to share the profits only in moieties, and not the capital; as, for example, in the case of a partnership between a father and a son, where the father supplied the whole capital. However this may be, the Judges of the Scottish Court of Session adopted the doctrine of Lord Eldon, in the case of Thompson *v.* Williamson (7 Bligh, 432; s. c. 5 Wilson & Shaw, 16; 7 Shaw & Dunton, No. 338); but it was overturned in the House of Lords by the decision of Lords Wynford and Brougham. Mr. Bell and Mr. Erskine maintain the same doctrine as the Court of Session (2 Bell, Comm. B. 7, ch. 1, p. 614, 615, 5th edit.; Ersk. Inst. B. 3, tit. 3, § 19). Nor does it appear to me that the doctrine of Lord Stair (1 Stair, Inst. B. 1, tit. 16, § 3), is intended to be different, notwithstanding the suggestion of Lord Wynford. In Gould *v.* Gould (6 Wend. R. 263), the Court of Errors of New York held, that, in the absence of all proof to the contrary, partners will be presumed to be equally interested in the partnership funds. See Harrison *v.* Sterry, 5 Cranch, 289.

[1] Thompson *v.* Williamson, 7 Bligh, R. 432; s. c. 5 Wils. & Shaw, 16. [But see a later decision by Vice-Chancellor Wigram, Webster *v.* Bray, 7 Hare, R. 177, and another by Lord Cottenham, Stewart *v.* Forbes, 1 Hall & Twells, R. 472; s. c. 1 Macnaghten & Gordon, R. 137. In the latter case the Lord Chancellor refers to Peacock *v.* Peacock, and says: "In that case it was properly held, that, in the absence of any contract between the parties, or any dealing from which a contract might be inferred, it would be assumed, that the parties had carried on business on terms of an equal partnership. . . . But what would have been the decision in Peacock *v.* Peacock, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares in which the partners were interested in the business, and had attributed to the plaintiff four sixteenths only of the shares of

ties, as far as they go, seem decidedly to favor the doctrine of Lord Eldon.[1]

§ 25. The Roman Law promulgates the like doctrine. If no express agreement were made by the partners concerning their shares of the profit and loss, the profit and loss were shared equally between them. If there was any such agreement, that was to be faithfully observed. *Et quidem* (says the Institutes), *si nihil de partibus lucri et damni nominatim convenerit, æquales scilicet partes et in lucro et in damno spectantur. Quod si expressæ fuerint partes, hæc servari debent.*[2] So the Digest. *Si non fuerint partes societati adjectæ, æquas eas esse constat.*[3] This also seems to be the rule adopted into the modern commercial law; but then it is received, not without some modifications and qualifications.[4] Thus, Vinnius says, that this doctrine is commonly and rightly understood to be true, when the partners have contributed an equal amount to the capital stock; for if they have contributed unequal amounts, then they are to share according to the proportions furnished by each. Pufendorf and Noodt adopt the like interpretation;[5] al-

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the business? These entries are as conclusive of the rights of the parties, as if they had been found prescribed in a regular contract."]

[1] 3 Kent, Comm. Lect. 43, p. 28, 4th edit.; Gould *v.* Gould, 6 Wend. R. 263.

[2] Inst. Lib. 3, tit. 26, § 1; Voet, ad Pand. Lib. 17, tit. 2, n. 8, Tom. 1, p. 751; Vinn. Sel. Quest. Juris. ch. 53, 54; Domat, B. 1, tit. 8, § 1, art. 4.

[3] Dig. Lib. 17, tit. 2, Lib. 29; Pothier, Pand. Lib. 17, tit. 2, n. 7.

[4] See Vinn. ad Inst. edit. Heinecc. Lib. 3, tit. 26, § 3, p. 695, Comm.; Van Leeuwen's Comm. B. 4, ch. 23, § 10.

[5] Pufendorf on Law of Nat. and Nat. B. 5, ch. 8, § 1, 2; Noodt, Opera, Comm. ad Dig. Lib. 17, tit. 2, l. 29, Tom. 2, p. 297, 298, edit. 1767. But see Vinn. Sel. Quest. Juris. ch. 53, 54; Vinn. ad Inst. Lib. 3, tit. 26, § 2. See Asso & Manuel's Inst. of Laws of Spain, B. 2, tit. 15.

though it must be admitted, that there are other jurists, who construe the Roman law as indiscriminately applicable to all cases, whether of equal or of unequal contributions, either in capital or stock, or in labor or services, or in a mixed proportion of each.[1]

§ 26. Pothier himself, while he admits the correctness of the general rule of the Roman law, suggests some modifications, or rather qualifications of it, in its actual application.[2] Where each partner has contributed money or effects of a value fixed between them at the time, there, he says, that they are to share in proportion to the value so fixed; and that they are to share equally, only when no such value is fixed. Where the money or effects brought into the partnership, are so estimated at a fixed value, his opinion is, that it ought to make no difference as to the partners sharing in proportion to such value, although one may also bring a higher, or peculiar skill or industry into the firm.[3] The Civil Code of France provides, that the share of each partner in the profits or losses is in the absence of any other agreement in the articles of partnership, to be in proportion to what he brings into the partnership funds; and in the like case, if one partner brings skill only, his share of the profits or losses is regulated, as if what he brought in had been

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[1] Ibid.; Duvergier, Droit Civ. Franc. Tom. 5, n. 224. — Heineccius pays this beautiful tribute to the memory of Noodt, speaking of his then recent death: "Quem eximium jure consultum, dum hæc scribo, ad Superos excessisse, non sine dolore audio. Mortuum saltem nemo dixerit, qui tot egregiis operibus immortalem sibi gloriam peperit, et jam vivus, quodammodo interfuit posteritati." Hein. Vinn. ad Inst. Lib. 3, tit. 26, § 1, note.

[2] Pothier, De Societé, n. 15 to 20; Id. n. 73.

[3] Pothier, De Societé, n. 15 to 21; Id. n. 73. See also, Duvergier, Droit Civ. Franc. Tom. 5, n. 12, n. 224; Toullier, Droit Civ. Franc. Tom. 13, n. 411, 412.

equal to that of the partner, who has brought the least.[1] The Code of Louisiana more closely adheres to the Roman Law, and declares, that when the contract of partnership does not determine the share of each partner in the profits or losses, each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.[2]

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[1] Code Civil of France, art. 1853.

[2] Code of Louisiana (1825), art. 2896. — Mr. Watson has made some remarks on this subject, which show the difficulty of making a suitable apportionment of profits, in many cases, where there is no express agreement between the parties, and that presumptions of very different force and importance may arise from the circumstances, often nicely balancing each other. "But with respect to the profit and loss" (says he), "to be derived from a partnership, the subject of which comprises the capital, stock, and interest of each partner therein, together with the labor and skill to be employed, and the division thereof, what naturally occurs on point of distribution seems to be this, that if each partner contributes an equal proportion of capital, stock, and labor, and skill, then each must, according to justice, receive an equal share in the profit and loss; but where they contribute unequally, certain rules should be prescribed according to the circumstances of the partnership, for the purpose of adjusting the respective shares of all the partners. For instance, if one partner furnishes labor, and the other money, whatever the produce of such partnership trade may amount to, it should seem right to divide it, after deducting the sum advanced, in the proportion of the interest of the money to the wages of the labor, allowing such a rate of interest as money might be borrowed for upon the same species of security, and such wages or allowance as a skilful workman would be entitled to, for the same degree of labor and a similar trust, according to the principle laid down in the civil law, which says, that no man doubts, but that partnership may be entered into by two persons, when one of them only finds money, inasmuch as it often happens, that the work and labor of the other amounts to the value of it, and supplies its place. For in partnerships, where on the one side labor is contributed, and on the other, only the *use* of money, that partner, who contributed the money, does not always admit the other to a share of the principal, but only to his share of the profit, which such labor and money joined together might produce. And if A. for instance, who furnishes labor only, hath no title to any part of the money advanced upon dissolving the partnership, so B. alone should be liable to the risk of the money, as owner thereof; for in such a case it is not the money itself, but the risk, which it runs, and the probable gain, which

§ 27. These two circumstances, that there is a community of interest in the capital stock, and also a

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may accrue from it, that are to be compared with the labor. Therefore, when the profits of such a partnership are to be shared, it would be out of all proportion in point of reciprocal advantage, if the labor were to be compared with the principal sum advanced; and the only fair criterion to judge by is a true comparison between the value of the labor on one side, and the risk and hazard which the money advanced is exposed to on the other. And perhaps the better way in forming partnerships of this sort, is to rate the risk of the principal, and the hopes of the profit, according to the interest, that is generally given for money so borrowed upon risk. Supposing, then, this interest to be £5 per cent.; if one party contributes labor worth £50, and the other advances £1000 in money, each partner will share equally of the profit. According to this rule, if there should be nothing gained by the partnership concern, A. would lose his labor, and B. his interest, which would be equal and just. And should the original stock be diminished, by the same rule A. loses only his labor, whereas B. would lose his interest and a part of the principal; for which eventual disadvantage B. is compensated by having the interest of his money computed at five pounds per cent. in the division of the profits, where there are any. But it sometimes happens in partnership concerns, that labor and money are so blended or interwoven together, as to give to him, that contributed only his labor, a share in the principal; the labor contributed by one partner, and the money advanced by the other, being so intermixed as to make one general mass. As for example, one partner spends the money advanced by him in buying up unwrought materials, and the other furnishes personal skill and labor to work them up and manage them, which very often happens in large manufacturing towns. Thus, again, if I supply a weaver with £100 to buy wool, and he makes cloth of it, computing his labor at £100, it is manifest, that here both of us have an equal interest in the cloth, and when it is sold the money must be equally divided; nor in fairness could I deduct the £100 contributed at first, and then divide the remainder with him. This rule obtains in other things as well as money; as when one allows ground for a building, on condition that he, who builds thereon, shall have a moiety; or, when one trusts a flock to be fed on condition, that, if it be sold within a limited time, the money shall be proportionably divided amongst the partners. Therefore, the profit or loss to be derived from trade by partners ought always to be arranged and provided for at the commencement of their partnership, according to certain agreed proportions." Watson on Partn. ch. 1, p. 57 to 59, 2d edit. See also on the same point Voet, ad Pand. Lib. 17, tit. 2, n. 8; and Vinn. Sel. Quest. Jur. ch. 53, 54; Duvergier, Droit Civil Franc, n. 244 to 288; Duranton, Droit Civil Franc. Tom. 17, n. 415 to 433; Pothier, De Societé, n. 15 to 20; Collyer on Partn. B. 2, ch. 1, § 2,

community of profit and loss, in the sense already stated, in all the partners, where they exist, are deci-

p. 106, 107, 2d edit., cites Pufendorf, Lib. 5, ch. 8; Van Leeuwen's Comm. B. 4, ch. 23, § 10; Asso & Manuel's Instit. of Laws of Spain, B. 2, tit. 15. Mr. Rutherforth, in his Institutes (B. 1, ch. 13, § 32 to 36), has fully discussed the subject; and his remarks are so just and appropriate, that they are here cited. "In partnerships of trade, goods, or money, or labor, under which I include skill, or management, are, by the consent of their respective owners, united into one common stock. Each partner has in view a benefit to be received for a benefit, which he gives. The separate stock of any of the partners alone might be too small to trade with, in the manner proposed; or the nature of the undertaking may require not only more goods or more money than any one of them could supply, but more labor or more skill than any one of them is equal to. The gain, arising from the common stock of goods or money, is the price obtained for the use of those goods or money; and the gain, arising from their joint labor, is the wages obtained for such labor. If we consider the gain in this view, it is easy to determine what proportion of it each partner ought to receive. In whatever proportion the use of one partner's goods is more valuable than the use of the other partner's goods, so much more of the gain belongs to the former, than to the latter. I do not mean, that in dividing the gain, any regard is to be had to the particular share of it, which arose accidentally from the goods contributed by this or that partner; but that after the goods are united in a joint stock by agreement, each partner has a claim to the gain arising from it, in proportion to what was the probable value of the use of his goods, if he had traded with them separately. And as the probable value of the use is in proportion to the value of the goods themselves, each partner's claim upon the gain will be in the same proportion. In like manner, where there is a joint labor, since the profits arising from it are the wages of that joint labor, each partner has a claim, not to that particular part of the gain, which his labor earned, for then it would be no partnership, but to such a comparative share out of the common wages or gain, as is proportional to the value of his labor, when compared with the labor of the other. As the gain of each partner, so likewise the loss of each ought to be proportionable to the value of what he contributes. As much as the goods, which one partner contributes, exceed in their value the goods, which the other contributes, so much greater is the claim of the former upon the joint stock, than the claim of the latter. Since, therefore, their respective claims upon the whole stock are in proportion to the share of that stock, which came originally from each of them, their claim upon each part of the whole must be in the same proportion. And, consequently, if any part of the stock is lost, each partner having a claim upon such part lost in proportion to his original share, loses a claim in the same proportion, that is, the loss of each is in proportion

sive that the case is one of real partnership between the parties themselves.[1] But it is not essential in all

to the original share which he contributed towards the common stock. This, then, is the rule for adjusting the gain and loss in partnerships, where no express agreement has been made to the contrary. Each partner is to receive such a share of the gain, or to bear such a share of the loss, as has the same proportion to what any other of the partners receives or bears, that the share contributed by the former has to the share contributed by the latter. The interest or claim of each upon the whole stock is in this proportion; and, consequently, the interest or claim of each in the increase or decrease of it, in any part added to it by way of gain, or in any part taken from it by way of loss, ought to be in the same proportion. If the parties agree, that one of them shall have a share in the gain, but shall bear no share in the loss, the contract is a mixed one; it is partly partnership, and partly insurance. As they are all of them to have a share in the gain, it is partnership; but he or they, who are to bear all the loss, insure the principal stock of him who is to bear none of it. To adjust the shares, which each party, in such a mixed contract, is to receive in the gain, we are to consider what it is worth to insure his principal, who is not subject to any loss. And when the value of such insurance is deducted from the whole gain, and assigned to those who were to have borne all the loss, if there had been any, the remaining portion is to be divided in proportion to each party's share in the capital stock. It is generally maintained to be contrary to the nature of partnerships, that, where a capital stock is made by mutual consent, the parties so forming a capital stock should agree, that one of them should have all the gain, and the other bear all the loss. And certainly such an agreement is contrary to the nature of partnership, if we define partnership to be a contract, which gives the parties a common claim to the joint stock; because, where they have a common claim to the stock, they must, in consequence, have a common claim to the gain arising from it, and to the losses sustained in it. But such an agreement, though it may be inconsistent with the nature of partnership, is not inconsistent with the law of common justice. A man wants five hundred pounds capital stock, to enter upon a certain branch of trade; he has only three hundred pounds of his own. I agree to let him have two hundred pounds to make up his capital, upon condition, that he shall have all the advantage arising from the whole; that, if he saves the whole capital, my money shall be returned, but that if any part

[1] Dob v. Halsey, 16 John. R. 34; 3 Kent, Comm. Lect. 43, p. 24, 4th edit.; Collyer on Partn. B. 1, ch. 1, § 1, p. 11 to 17; 2d edit.; Ex parte Gellar, 1 Rose, R. 297. See also, Rawlinson v. Clarke, 15 Mees. & Welsb. R. 292; Allen v. Davis, 8 English, 173.

cases, to constitute such a partnership, that both should concur, that is, that there should exist, as between the

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of it is lost, I will bear the loss, as far as the two hundred pounds, which I have advanced. There can, I think, be no question, whether the law of nature would allow of such an act of humanity as this. You may say, that such an agreement is contrary to the law of partnership. I grant it is, and therefore am satisfied, that it should not be called a partnership. I only insist, that the agreement is not contrary to the law of nature, and leave it to you to call it by what name you please. Perhaps you may have no name for it; but a contract is not the more unlawful for wanting a name. In partnership, where work is contributed on one side, and money on the other, the partner, from whom the money comes, may contribute either the use only of the money, or the property of it. If he contributes only the use of it, and still keeps his property in the principal, so that the joint stock is to be considered as made up of the labor of one partner, and of the use of the other's money; it is plain, that, supposing the principal to be safe, it belongs to him, and that, supposing it to be lost, he alone is to bear such loss. The other partner, who contributes work, since, as the case is put, he had no claim to the principal money, or to any part of it, cannot be obliged to make good any part of that loss, or to bear any share in it. But if he contributes the property of his money, so that the joint stock, upon which each of them has a common claim, is made up of his principal money, and of the other's labor, then the partner, who labors, has a claim upon the principal money itself; and, consequently, whenever the partnership is dissolved, if the principal money, or any part of it is safe, he ought to have a share in it; and if the principal is lost, he is a sufferer by losing such share. In the former case, where he, from whom the money comes, still keeps his property in it, and has a right to the whole principal, you may ask, what it is, which he contributes. But the answer is obvious. He contributes the use of his money; that is, he contributes the clear gain, which he might probably have made of it himself. This, however, is not all. He contributes, besides this, the hazard of his principal; because, if the whole or any part of it should be lost, the loss is his. In order, therefore, to adjust the share which each partner ought to have in the gain, if there is any, you are to value the work of one, and the use and hazard of the other's money; and in proportion to the value contributed by each of them, upon such an estimate, their respective gains are to be settled. In the other case, where he, from whom the money comes, contributes the property of it, and the other contributes his labor, in adjusting their respective shares of the gain, you are to value the money of one and the labor of the other. And when the comparative values of what each has contributed are thus settled, their respective shares in the gain are to be in the same proportion."

parties themselves, a community or communion of interest in the capital stock, and also in the profit and loss. For, if the whole capital stock, embarked in an enterprise or adventure, belongs to, and is, by agreement, to remain the exclusive property of one of the parties; yet, if there is a community of profit or of profit and loss, in the enterprise or adventure, between all the parties, they will be partners in the profit, or the profit and loss between themselves, as well as to third persons, although not partners in the capital stock.[1] The one does not necessarily include the other, and therefore we are carefully to distinguish between the cases. Where there is a positive agreement between the parties on this point, that will govern; where there is no such agreement, and no implication from the circumstances of the particular case, leading to a different conclusion, there will be presumed to be a community of interest in the property, as well as in the profit and loss.[2] Where the property of one partner only is, by agreement, actually put into community, as partnership property, there, in the absence of any controlling stipulations, the like community in the profit and loss will be intended to exist between the parties, as incident to the community of property.[3] But where the agreement merely in terms expresses, that the property is furnished by one partner, and the parties are to have a community of interest, and share in the profit and loss, the like inference is not ordi-

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[1] Ex parte Hamper, 17 Ves. 404.

[2] Collyer on Partn. B. 2, ch. 1, § 2, p. 106 to 113, 2d edit. See Brophy v. Holmes, 2 Molloy, R. 1.

[3] Reid v. Hollinshead, 4 Barn. & Cresw. 867.

narily or necessarily deducible.[1] And accordingly it has been held at the common law, that if A. is the owner of goods, and agrees with B., that B. shall be interested in a particular portion of the profit and loss of the adventure or voyage abroad, in which the goods are to be embarked, such an agreement will not alone make A. and B. partners in the goods, as between themselves, but only partners in the profits.[2] But, if the goods themselves are purchased on joint account, or are treated as a joint concern, or both parties are, by their agreement, to be interested therein; there, a very different inference will arise, and the parties will be treated as partners in the goods, as well as in the profits and losses.[3] The like doctrine will apply, where each of the parties contributes labor and services and materials in the manufacture of any articles of trade, and the articles, when made, are to be equally or proportionably shared between them; they will be deemed partners, *inter sese;* for the articles manufactured, and so to be divided, may well be deemed the profits or losses of their joint undertaking and business. It is not a mere division of a capital stock jointly purchased, but of a capital stock in new proceeds or products.[4]

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[1] Collyer on Partn. B. 2, ch. 1, § 2, p. 106 to 112, 2d edit.; Mair *v.* Glennie, 4 M. & Selw. 240.

[2] Meyer *v.* Sharpe, 5 Taunt. R. 74; Smith *v.* Watson, 2 Barn. & Cresw. 401; Collyer on Partn. B. 2, ch. 1, § 2, p. 107 to 112, 2d edit.; Heskett *v.* Blanchard, 4 East, R. 144; Ex parte Hamper, 17 Ves. 404; Mair *v.* Glennie, 4 M. & Selw. 240; [Explained in Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 74]; Hall *v.* Leigh, 8 Cranch, R. 50; Clement *v.* Hadlock, 13 New Hamp. R. 185.

[3] Reid *v.* Hollinshead, 4 Barn. & Cresw. 867; Collyer on Partn. B. 2, ch. 1, § 2, p. 112, 113, 2d edit.; Ex parte Gellar, 1 Rose, R. 297; Soule *v.* Hayward, 1 Cal. 345.

[4] Musier *v.* Trumpour, 5 Wend. R. 274; Everett *v.* Chapman, 6 Conn. R.

§ 28. The like distinction is recognized and maintained by foreign jurists. Pufendorf says: "Upon breaking up of partnership, if each party only contributed money, it is plain, upon a division, that each must receive according to his contribution. But if both money and labor were contributed, it must be considered after what manner the contribution or collection was made; for when labor is contributed on one side, and only the use of money on the other, he who contributed the money, does not admit the other to a share in the principal, but only to his proportion of the gain, that might be made of the money and labor joined together. And in this case, as he, that contributed only labor, has no title to any part of the money, when they break off partnership, so the other alone, as owner, is concerned in the risk that the money is exposed to; and in such a partnership as this, not the money itself, but the risk, that it runs, and the gain, that may be probably expected from it, is compared with the labor."[1] He afterwards adds: "But sometimes the labor and money are so interwoven together, as to give him, that contributed only his labor, a share even in the principal; the labor of the one, and the money of the other, being in a manner united into one mass. As when one lays out his money upon unwrought commodities, and another spends his labor in working them up, and managing them. Thus, if I give a weaver £100 to buy wool, and he makes cloth of it, computing his labor at £100,

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347; Wadsworth v. Manning, 4 Md. R. 59; 3 Kent, Comm. Lect. 43, p. 24, 25, 4th edit.

[1] Pufendorf on Law of Nat. and Nat. B. 5, ch. 8, § 2, by Kennet, and Barbeyrac's note.

it is manifest, that here both of us have an equal interest in the cloth; and, when it is sold, the money must be equally divided. Nor ought I to subtract the money, that I contributed at first, and then divide the remainder with him."[1]

§ 29. The like distinction is asserted by Pothier. "When" (says he) "two persons contract a partnership between themselves, to sell in common certain goods, which belong to one of them, and to share the proceeds, it is necessary carefully to examine what is their intention. If the intention is to put the very goods into partnership, the partnership will extend to the same; and if a part of the goods perish before the sale proposed by the parties is made, the loss will be borne as a common loss. But, if the intention is to put into partnership, not the goods themselves, but the price which shall be obtained therefor, the entire loss will fall upon the partner, to whom the goods belonged."[2] And Pothier adds, that the like rule will apply to the case of two merchants, who are associated for the sale of merchandise, which each of them has in his own shop. It will depend upon the nature of their agreement, as to the goods being brought into partnership, or only the proceeds, when sold, whether, if a loss takes place, it is to be borne by both as a common loss, or by the original owner only.[3] The Roman law was equally direct and expressive. *Cum tres equos haberes, et ego unum, societatem coimus, ut, accepto equo meo, quadrigam venderes, et ex pretio quartam mihi redderes. Si*

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[1] Pufendorf on Law of Nat. and Nat. B. 5, ch. 8, § 2, by Kennet, and Barbeyrac's note.

[2] Pothier, de Societé, n. 54.

[3] Ibid.

igitur ante venditionem equus meus mortuus sit, non putare se, Celsus ait, societatem manere, nec ex pretio equorum tuorum partem deberi; nec enim habendæ quadrigæ, sed vendendæ coitam societatem. Cæterum, si id actum dicatur ut quadriga fieret, eaque communicaretur, tuque in ea tres partes haberes, ego quartam, non dubie adhuc socii sumus.[1] We here see the distinction clearly laid down between a partnership in the capital stock, and a partnership in the profits or losses, arising from the sale. Ulpian also says: "*Coiri societatem et simpliciter licet; et si non fuerit distinctum, videtur coita esse universorum, quæ ex quæstu veniunt; hoc est, si quid lucrum ex emptione, venditione, locatione, conductione, descendit.*[2] Vinnius has put the same distinction in a clear light: *Possunt igitur duo societatem sic coire, ut unus pecuniam conferat, unde merces emantur et negotiatio exerceatur; alter operam duntaxat, qui proficiscatur ad merces emendas, emat et vendat, ut sic deinde lucrum commune sit. Cæterum hæc collatio non uno modo fit; nam aut opera confertur cum solo pecuniæ usu, quo casu sors domino perit, et si salva est, domino salva est; aut opera confertur cum ipso dominio pecuniæ, quo casu qui operam impendit, particeps fit sortis. In primâ specie comparatur cum opera non sors, sed periculum amittendæ sortis, et lucrum, quod ex ea probabiliter sperari poterat. In altera operæ pretium habetur, quasi sorti adjectum, et pro eo, quod valet, in ipsa sorte partem habet, qui operam præstat.*" [3]

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1 Dig. Lib. 17, tit. 2, l. 58; Id. l. 58, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 22; Domat, B. 1, tit. 8, § 4, art. 14; Collyer on Partn. B. 1, ch. 2, § 2, p. 109, 2d edit.

2 Dig. Lib. 17, tit. 2, l. 7; Pothier, Pand. Lib. 17, tit. 2, n. 20; Domat, B. 1, tit. 8, § 3, art. 2.

3 Vinn. ad Inst. Lib. 3, tit. 26, § 2, n. 3, p. 697.

CHAPTER IV.

PARTNERSHIP AS TO THIRD PERSONS.

§ 30. In considering the question, when and under what circumstances a partnership may exist, as to third persons, although not between the parties themselves, we are led to the remark, that there may be a community of interest in property, without any community in the profits thereof, as well as a community of interest in the profits, without any community in the property, out of which they are to arise. The absence of both ingredients is necessarily decisive that no real partnership exists. But a nice and difficult question may arise, and, indeed, often does arise. When and under what circumstances, notwithstanding the absence of one of these ingredients, the presence of the other will still be deemed to create a partnership between the parties themselves; or, if not between themselves, yet it will be deemed to exist, as to third persons.[1] It may be laid down as a general rule, that in all such cases no partnership will be created between the parties themselves, if it would be contrary to their real intentions and objects. And none will be created between themselves and third persons, if the whole transactions are clearly susceptible of a different

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[1] See Gibson *v.* Lupton, 9 Bing. R. 297; Post *v.* Kimberley, 9 Johns R. 470; Geddes *v.* Wallace, 2 Bligh, R. 270; Hazard *v.* Hazard, 1 Story, R. 371. See 1 Smith, Lead. Cas. p. 504, &c., 2d edit., note to Waugh *v.* Carver; 2 H. Bl. 235.

interpretation, or exclude some of the essential ingredients of partnership. Thus, for example, as has been already intimated, if two persons should agree to purchase goods on joint account in certain proportions, without any intention to sell them on joint account, or to be jointly concerned in the future sale, this will give them a community of interest in the property, when purchased, but will not make them partners; and they will be joint tenants or tenants in common thereof, according to circumstances.[1] And it will make no difference, whether the purchase is made in their joint names, or in the name of one of them, or through the instrumentality of an agent.[2] In cases of this sort one essential ingredient, that of a communion of profit and loss, is wanting.[3] Upon similar principles, if two persons agree to do a particular piece of work, but the money received for the work is not to be employed on their joint account, or for their joint benefit, the persons so contracting are not partners, but merely joint contractors.[4] So, if two joint owners of merchandise should consign it to the same consignee for sale, informing him, that each

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[1] Ante, § 3; 3 Kent, Comm. Lect. 43, p. 25, 26; Coope *v.* Eyre, 1 H. Bl. 37; Gow on Partn. ch. 1, p. 10, 11, 3d edit.; Id. ch. 4, p. 153, 154; Smith *v.* Watson, 2 Barn. & Cresw. 401; Harding *v.* Foxcroft, 7 Greenl. R. 76; Jackson *v.* Robinson, 3 Mason, R. 76.

[2] 3 Kent, Comm. Lect. 43, p. 25, 26; Hoare *v.* Dawes, Doug. R. 371; Coope *v.* Eyre, 1 H. Bl. 37; Post *v.* Kimberley, 9 Johns. R. 470; Holmes *v.* United Insur. Co. 2 Johns. Cas. 329; Harding *v.* Foxcroft, 6 Greenl. R. 76.

[3] Coope *v.* Eyre, 1 H. Bl. 37; Gow on Partn. ch. 1, p. 10, 3d edit.; Collyer on Partn. B. 1, ch. 1, § 1, p. 11 to 15, 2d edit.; Gibson *v.* Lupton, 9 Bing. R. 297.

[4] Collyer on Partn. B. 1, ch. 1, § 1, p. 15, 16, 2d edit.; Finckle *v.* Stacey, Sel. Cas. in ch. 9; Dwinel *v.* Stone, 30 Maine, 388.

owns a moiety thereof, and should give him separate and distinct instructions, each for his own share, as to the sales and returns, they would not be partners in the adventure; but each would be deemed entitled to a separate account, and a separate action against the consignee, if he should disobey his own orders.[1]

§ 31. But cases may nevertheless occur, where a community of interest in the property may draw after it the establishment of a partnership between the parties, although a sale of the property for the joint profit may not be contemplated by the parties. Thus, as in the example already suggested, if two persons should agree together, to furnish an equal quantity of materials to manufacture articles of a particular description, and to employ their mutual skill, labor, and services, in manufacturing the articles; and then the articles were to be equally divided between them, and sold by each on his separate account, there, a partnership in the property and manufactured articles would be deemed to exist.[2]

§ 32. On the other hand, there may be a community of interest in the profits between the parties, without any community of interest in the property itself. [Thus, when two mercantile firms agree to share profits and loss upon contracts for the purchase or sale of merchandise in a particular branch of their business, to be made by each firm separately in its own name, and to be executed with its separate fund, this does not constitute

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[1] Hall *v.* Leigh, 8 Cranch, 50; Jackson *v.* Robinson, 3 Mason, R. 138.

[2] Ante, § 27; Musier *v.* Trumpour, 5 Wend. R. 274; Everett *v.* Chapman, 6 Conn. R. 347; Bond *v.* Pittard, 3 Mees. & Welsb. 357; 3 Kent, Comm. Lect. 43, § 24, 25, 26, 4th edit. See also, Jordan *v.* Wilkins, 3 Wash. Cir. R. 110.

them partners, either as between themselves or to third persons; since each firm would be separately bound to fulfil its own contracts, and there would be no union of funds, services, or property, but only a division of profit and loss.[1]] But this participation in the profits will not (as we have seen[2]) create a partnership between the

[1] Smith v. Wright, 5 Sandf. 113.

[2] Ante, § 27, 28; Hazard v. Hazard, 1 Story, R. 371. In this case the court said: "Now, upon the point, whether there was a partnership or not between these parties in the factory business, under the agreement, it is necessary to take notice of a well-known distinction between cases, where, as to third persons, there is held to be a partnership, and cases where there is a partnership between the parties themselves. The former may arise between the parties by mere operation of law against the intention of the parties; whereas, the latter exists only when such is the actual intention of the parties. Thus, if A. and B. should agree to carry on business for their joint profits, and to divide the profits equally between them, but B. should bear all the losses, and should agree, that there should be no partnership between them; as to third persons dealing with the firm, they would be held partners, although *inter sese*, they would be held not to be partners. This distinction is often taken in the authorities. It was very fully discussed and recognized in Carver v. Waugh (2 H. Bl. 235); Cheap v. Cramond (4 Barn. & Ald. 663); Peacock v. Peacock (16 Ves. 49); Ex parte Hamper (17 Ves. 404); Ex parte Hodgkinson (19 Ves. 291); Ex parte Langdale (18 Ves. 300); Tench v. Tench (6 Madd. R. 145, note); Hesketh v. Blanchard (4 East, R. 144); Muzzy v. Whitney (10 Johns. R. 226); Dob v. Halsey (16 Johns. R. 34). The question before us is, not as to the liability to third persons; but it is solely whether between themselves the agreement was intended to create and did create a partnership. I have looked over the agreement carefully, and my opinion is, that no partnership whatsoever was intended between the parties; but that Benjamin Hazard was to be employed as a mere superintendent, and not as a partner; and was to be paid the stipulated portion of the profits for his services as superintendent. This, it is said, in the agreement, was to be the *sole* reward for his services; and, if there were no profits, then he was to submit to lose the value of his services. It is not anywhere said in the agreement, that the parties are to be partners in the business; nor that Benjamin Hazard is to pay any part of the losses. But language is used, from which, I think, it may fairly be inferred, as the full understanding of the parties, that the whole capital stock was to be held by T. R. Hazard, as his sole and exclusive property, and that the stock was to be furnished by him, and the proceeds thereof was to be delivered and

parties themselves, as to the property, as well as the profits, contrary to their intentions.[1] Nor will it neces-

sold by him, and charged to him, as his individual property, and debts and credits. Now, if this be so, there is no pretence to say, that the parties intended a partnership. A mere participation in the profits will not make the parties partners *inter sese*, whatever it may do as to third persons, unless they so intend it. If A. agrees to give B. one third of the profits of a particular transaction in business, for his labor and services therein, that may make both liable to third persons as partners; but not as between themselves. This was the very point adjudged in Hesketh *v.* Blanchard (4 East, 144), where Lord Ellenborough said: 'The distinction taken in Waugh *v.* Carver and others, applies to this case. *Quoad* third persons it was a partnership, for the plaintiff was to share half the profits. But, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble and for lending R. his credit.' The same doctrine was fully recognized in Muzzy *v.* Whitney (10 Johns. R. 226). It is not necessary in the present case, to decide, whether Benjamin Hazard was, under the agreement, a partner as to third persons. That question may be left for decision, until it shall properly arise in judgment. And before it is decided, it might be necessary to examine a very nice and curious class of cases, standing, certainly, upon a very thin distinction, if it is a clearly discernible distinction, between cases of partnership as to third persons, and cases of mere agency, where the remuneration is to be by a portion of the profits. This distinction is alluded to by Lord Eldon, in Ex parte Hamper (17 Ves. 404), and by Lord Chief Justice Abbott in Cheap *v.* Cramond (4 Barn. & Ald. 663, 670). In the latter case, the Chief Justice said: 'Such an agreement is perfectly distinct from the cases, put in the argument before us, of remuneration made to a traveller, or other clerk or agent (in proportion to the profits), by a portion of the sums received by the master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion.' It was also acted upon in Muzzy *v.* Whitney (10 Johns. R. 226); Dry *v.* Boswell (1 Camp. R. 329); Wish *v.* Small (Ibid., note); Benjamin *v.* Porteus (2 H. Bl. 590); and Wilkinson *v.* Frazier (4 Esp. R. 182); and Mair *v.* Glennie (4 Maule & Selw. 240, 244). My judgment is, that in the present case the parties never intended any partnership in the capital stock; but a mere participation of interest in the profits; and that the one third or one fourth of the profits, allowed by the agreement to Benjamin Hazard, was merely a mode of paying him as agent for his superintendency of the factories."

[1] Wish *v.* Small, 1 Camp. R. 331, note; Dry *v.* Boswell, 1 Camp. R. 329, 330; Mair *v.* Glennie, 4 Maule & Selw. 240; [Explained in Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 74;] Clement *v.* Hadlock, 13 New Hamp. R. 186; Post, § 41, 42.

sarily create such a partnership in all cases, as to third persons. The various cases, in which a partnership may exist, as to third persons, although not between the parties themselves, will presently come under our consideration;[1] and therefore, what is here said, will principally respect the question, when no partnership is created either way. Thus, if a party has no interest whatsoever in the capital stock, and as between himself and the other parties, has also no rights as a partner, or no mutuality of powers and duties, but is simply employed as an agent, and is to receive either a given sum out of the profits, or a proportion of the profits, or a residuum of the profits beyond a certain sum, as a compensation for his labor and services, as agent of the concern, and not otherwise; he will not be deemed a partner in the concern from that fact alone; not a partner with the others *inter sese*, for that would be contrary to their intentions and objects;[2] nor as to third persons, because the transaction admits of a different interpretation, and may justly be deemed a mere mode of ascertaining and paying the compensation of an agent, as in a naked case of agency. In such a case, it may be properly enough said, that the agent is entitled to a share or portion in the profits, liquidated or unliquidated, and, therefore, that he has, in a certain sense, a community of interest therein, with the actual partners. But he does not participate therein as an owner *pro tanto*, or as possessed thereof *per my et per tout*, or as

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[1] Post, § 53 to 70.

[2] Gow on Partn. ch. 1, p. 10, 11; Geddes *v.* Wallace, 2 Bligh, R. (O. S.) 270; Benjamin *v.* Porteus, 2 H. Black. 590; Dry *v.* Boswell, 1 Camp. R. 329, 330; Wish *v.* Small, 1 Camp. R. 331, note; Ex parte Watson, 19 Ves. 461; Muzzy *v.* Whitney, 10 Johns. R. 226; Turner *v.* Bissell, 14 Pick. R. 192. See Garey *v.* Pike, 10 Adol. & Ellis, 512; Post, § 33 to 36, 38 to 40.

clothed with the rights, and powers, and duties of a partner. He has only a limited interest therein, either as entitled to a fixed sum, to be paid out of the profits, or as entitled to a lien therein, or as possessed of an undivided portion thereof as a tenant in common.

§ 33. The distinction between the cases, where a participation in the profits will make a man liable to third persons, as a partner, or not, is sometimes laid down by elementary writers in different language. Thus it has been said by a learned writer: "A distinction, however, prevails between an interest in the profits themselves, *as profits*, and the payment of a given sum of money in proportion to a given quantum of the profits, as the reward of, and as a compensation for labor and services."[1] Another learned writer has expressed himself in the following terms: "In order to constitute a communion of profit between the parties, the interest in the profit must be mutual, that is, each person must have a specific interest in the profits *as a principal trader*. He is not a partner, if he merely receives out of the profits a compensation for his trouble, in the character of an agent or servant of the concern."[2]

§ 34. The distinction, as thus presented, does certainly wear the appearance of no small subtlety and refinement, and scarcely meets the mind in a clear and unambiguous form;[3] for the question must still recur; when may a party properly be said to have "an interest in the profits, *as profits?*" When also may it properly be said, that "the interest in the profits is mutual,"

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[1] Gow on Partn. ch. 1, p. 18, 3d edit.; Brockaway *v.* Burnap, 16 Barbour, 309; Pierson *v.* Steinmeyer, 4 Rich. 309.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 17, 18, 2d edit.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 23, 2d edit.

and that "each person has a specific interest in the profits, *as a principal trader?*" No absolute test is given to distinguish the cases from each other, and it is not easy to grasp it, when stated in so abstract a form. The true meaning of the language, "an interest in the profits, *as profits* (which has probably been borrowed from the subtle and refined statement of an eminent judge),[1] seems to be, that the party is to participate, indirectly at least, in the losses, as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits.[2] If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the gross profits, then it will be otherwise.[3] Thus, where an agreement was made between the owner of a lighter, and B., a lighter-man, that, in consideration of his working the lighter, he should have half her gross earnings, it was held to be only a mode of paying B. wages for his labor, and not a partnership; but, that if the profits were to be equally divided between them, there the participation of the parties of the profit and loss would make the agreement a partnership.[4]

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[1] Lord Eldon.

[2] Post, § 56.

[3] Bond *v.* Pittard, 3 Mees. & Wels. 357; s. c. 1 Tyrw. & Grang. R. 848; post, § 220, and note; post, § 42, 48.

[4] Dry *v.* Boswell, 1 Camp. R. 329, 330; Cheap *v.* Cramond, 4 Barn. & Ald. 663, 670. See also, Waugh *v.* Carver, 2 H. Bl. 235, 246, 247; Saville *v.* Robertson, 4 Term R. 720; Bond *v.* Pittard, 3 Mees. & Wels. R. 357. See also, Cutler *v.* Winsor, 6 Pick. R. 335; Bailey *v.* Clark, 6 Pick. R. 372; Turner *v.* Bissell, 14 Pick. R. 193; Chase *v.* Barrett, 4 Paige, R. 148, 159; Pearson *v.* Shelton, 1 Mees. & Wels. 504; s. c. Tyrwh. & Grang. 848; Brigham *v.* Dana, 29 Verm. 9; Post, § 53 to 69, § 220. — In this case the distinction is clearly pointed out between participation in the gross profits and participation in the net profits. See post, § 220, note. See 1 Smith, Lead. Cas. p. 504, 2d edit., note to Waugh *v.* Carver, 2 H. Black. 235. The

§ 35. Lord Eldon has adverted to the like distinction, and disapproved of it in strong terms. On one occasion his Lordship said: "The cases have gone further to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration; that if a trader agrees to pay another person, for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but, if he has a specific interest in the profits themselves, as profits, he is a partner."[1] On another occasion, he said, referring to the case before him, "That it was impossible to say, that as to third persons, they (the parties) were not partners, the ground being settled, that if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner; and no arrangement between the parties themselves could prevent it."[2]

§ 36. But however nice the distinction may be in itself, and however difficult it may be successfully to

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case of Thompson *v.* Snow, 4 Greenl. R. 264, seems to be contrary; for it makes no distinction between sharing the net earnings and sharing the gross earnings; post, 44, and Reynolds *v.* Toppan, 15 Mass. R. 370. See also, Loomis *v.* Marshall, 12 Conn. R. 69; post, § 45; Denny *v.* Cabot, 6 Met. R. 82; Bradley *v.* White, 10 Met. R. 303.

[1] Ex parte Hamper, 17 Ves. 404; Collyer on Partn. B. 1, ch. 1, § 1, p. 23, 24, 2d edit.; Ex parte Watson, 19 Ves. 461; Turner *v.* Bissell, 14 Pick. R. 192; Loomis *v.* Marshall, 12 Conn. R. 69; 1 Smith, Lead. Cas. 504, note 2.

[2] Ex parte Rowlandson, 1 Rose, R. 89, 91, 92; Collyer on Partn. B. 1, ch. 1, § 1, p. 24 to 29, 2d edit.; Ex parte Langdale, 18 Ves. 300. See also the remarks of Mr. Chief Justice Gibson in Miller *v.* Bartlett, 15 Serg. & R. 137. See Hazard *v.* Hazard, 1 Story, R. 371 to 376; Ante, § 32, note.

apply it to the circumstances of particular cases, it is by no means clear, that there is not a very just and satisfactory foundation on which it may well rest.[1] The question in all this class of cases is first to arrive at the intention of the parties *inter sese ;* and secondly, if between themselves there is no intention to create a partnership either in the capital stock, or in the profits, whether there is any stubborn rule of law, which will nevertheless, as to third persons, make a mere participation in the profits conclusive, that there is a partnership. If there is any such rule of law, the next inquiry is, as to the nature, and foundation, and true extent thereof. Now, it is incumbent upon those who insist that a partnership exists between the parties, as to third persons, by mere operation of law, in opposition to their own intention, to establish, that in the given case, under all the circumstances, there is such a rule, and that it is strictly applicable. What then is the rule of law relied on for the purpose ? It is said, that the true criterion is, whether the parties are to participate in profit ;[2] or, according to the language used on another occasion, "Every man, who has a share in the profits of a trade, ought also to bear his share of the loss as a partner."[3] In a just sense this language is sufficiently expressive of the general rule of law ; but it is assuming the very point in controversy to assert, that it is universally true, or that there are no qualifications, or limitations, or exceptions to it. On the

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[1] See 3 Kent, Comm. Lect. 43, p. 33, 34, 4th edit.

[2] Lord Eldon in Ex parte Langdale, 18 Ves. 300.

[3] Grace v. Smith, 2 W. Black. R. 998, 1000 ; Ex parte Hamper, 17 Ves. 404 ; Ex parte Watson, 19 Ves. 461 ; Waugh v. Carver, 2 H. Bl. 247 ; Turner v. Bissell, 14 Pick. R. 192.

contrary, the very cases alluded to by Lord Eldon, in the clearest terms establish, that such qualifications, limitations, and exceptions do exist; and are either contemporaneous with the promulgation of the general rule, or are necessary to its just application and use. It is, therefore, far from being universally true, that a mere participation in the profits, constitutes the party a partner; at most, it is true only *sub modo*. Indeed, as an original question, it might admit of very grave doubt, whether it would not have been more convenient, and more conformable to true principles, as well as to public policy, to have held, that no partnership should be deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public.[1] But the common law has already settled it otherwise; and therefore it is useless to speculate upon the subject.[2]

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[1] See the remarks of Mr. Chancellor Walworth, in Chase *v.* Barrett, 4 Paige, R. 148, 159, 160; Post, § 48, 49.

[2] The ground upon which the participation in the profits of a trade, although no partnership, is intended to exist between the parties shall, make them partners as to third persons, is thus stated by Lord Chief Justice De Grey, in Grace *v.* Smith (2 W. Black. 998, 1000). "Every man, who has a share of the profits of a trade, ought also to bear his share of the loss. And if any one takes part of the profits, he takes a part of that fund on which the creditor relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security, and yet the lender is generally interested in those profits. He relies on them for repayment." Now, to say the least of it, this reasoning is very artificial; for if the creditor trusts to the personal security of his debtor generally, for advances made, or goods sold, and he has no lien on the property or profits of the trade for repayment, it seems difficult to perceive why other persons should be liable to him on account of their receipt of a portion of the profits, there being no privity of contract and no partnership existing in the advances of money or goods sold between the parties. Why should a mere participant in the

§ 37. The Roman law, and the modern foreign law do not appear to have created a partnership between the parties, as to third persons, without their consent,

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profits, contrary to the intent of the agreement between himself and his co-contractor, be held responsible to a creditor of the latter, when the latter has trusted to his personal security, and only had a general confidence, that he was doing a profitable business? Why should the creditor's contract displace the contract of the immediate parties? The rule might have some show of equity, if the party were only held liable to the extent of the profits received by him. But the rule makes him liable to pay all the losses, and all the debts, whether he has received any profits or not. There is great force on this point in the argument of the counsel for the defendants in Waugh *v.* Carver, 2 H. Black. 244, 245. It was there said: "The profits are not a capital, unless carried on as a capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So, if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers, who entered into similar agreements to share the produce of their separate labor, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships, with which the parties were concerned, for such as came to the particular address of one, were to be the sole profit of that one. It was, indeed, clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts, or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must, therefore, be a strong and invariable rule of law, that can make the parties to the agreement responsible for each other, against their express intent. But all cases of partnership, which have been hitherto decided, have proceeded on one or other of the following grounds: — (1) Either there has been an avowed authority given to one party to contract for the rest; (2) Or, there has been a joint capital or stock; (3) Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colors to the world." See also post, § 48 to 52. However, the doctrine is (as is fully stated in the text) completely established, upon the very ground asserted in Grace *v.* Smith. See Waugh *v.* Carver, 2 H. Black. 235, 246, 247; Cheap *v.* Cramond, 4 Barn. & Ald. 663; Dob *v.* Halsey, 16 Johns. R. 34; McIver *v.* Humble, 16 East, R. 169, 174, 175; 3 Kent, Comm. Lect. 43, p. 24, 25, 27, 4th edit.; Ex parte Langdale, 18 Ves. 300; Pott *v.* Eyton, 3 Manning, Granger & Scott, R. 32; Barry *v.* Nesham, 3 Ibid. 641.

or against the stipulations of their own contract; and, therefore, the common law seems to have pressed its principles on this subject to an extent not required by, even if it is consistent with, natural justice.[1] Indeed, the Roman law deemed all contracts to be made only between the immediate parties thereto; and no direct remedy was generally furnished to or against third persons, even where one of the immediate parties was a mere agent of such third persons, and it required the interference of the Prætor to enlarge the remedy by an equitable extension to reach them.[2]

§ 38. Admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances, it remains to consider, whether the rule ought to be regarded, as any thing more than mere presumptive proof thereof, and therefore liable to be repelled, and overcome by other circumstances, and not as of itself overcoming or controlling them.[3] In other words, the question is, whether the circumstances, under which the participation in the profits exists, may not qualify the presumption, and satisfactorily prove, that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere

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[1] See Domat, B. 1, tit. 8, § 2, art. 1; Id. § 4, art. 18; Civil Code of France, art. 1862 to art. 1865; Vinn. ad Inst. Lib. 3, tit. 26, § 2, n. 3; Duranton, Droit Civil, Tom. 17, n. 328 to 331; Duvergier, Droit Civ. Franc. Tom. 5, n. 45; Id. n. 385 to 387; Pardessus, Droit Comm. Tom. 4, n. 969; Post, § 50.

[2] Story on Agency, § 165, 261, 271, 425.

[3] [In Wood *v.* Vallette, 7 Ohio St. R. 172, it was held that a contract between parties to share in the *net profits* of a business, to the carrying on of which they respectively contribute, *necessarily* makes them partners as to third persons dealing with the firm.]

compensation for labor and services. If the latter be the true predicament of the party, and the whole transaction admits, nay, requires, that very interpretation, where is the rule of law, which forces upon the transaction the opposite interpretation, and requires the Court to pronounce an agency to be a partnership, contrary to the truth of the facts, and the intention of the parties? Now, it is precisely upon this very ground, that no such absolute rule exists, and that it is a mere presumption of law, which prevails in the absence of controlling circumstances, but is controlled by them, that the doctrine in the authorities alluded to is founded. If the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled. In this way the law carries into effect the actual intention of the parties, and violates none of its own established rules. It simply refuses to make a person a partner, who is but an agent for a compensation payable out of the profits; and there is no hardship upon third persons, since the party does not hold himself out as more than an agent. This qualification of the rule (the rule itself being built upon an artificial foundation) is, in truth, but carrying into effect the real intention of the parties, and would seem far more consonant to justice and equity, than to enforce an opposite doctrine, which must always carry in its train serious mischiefs or ruinous results, never contemplated by the parties. In this view the distinction, taken in the authorities above alluded to, has a reasonable and just foundation, and is entirely consistent with the equities, which ought to prevail in all reciprocal contracts.[1]

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[1] Mr. Chancellor Walworth has expressed himself in favor of the distinc-

§ 39. Keeping this distinction in view, all the supposed repugnancy or difficulty of the various decided

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tion as well founded, in the case of Champion *v.* Bostwick, 18 Wend. 175, 184. He there said: "There is a class of cases, in which it has been held that a person, who merely receives a compensation for his labor in proportion to the gross profits of the business in which he is employed, is not a partner with his employer even as to third persons. The distinction appears to be between the stipulation for a compensation proportioned to the profits, and a stipulation for an interest in such profits, so as to entitle him to an account as a partner (1 Rose, R. 91); a distinction, which Lord Eldon says is *so thin*, that he cannot state it as settled upon due consideration. But he says, it is clearly settled as to third persons, though he regrets it, 'that if a man stipulates, that as the reward of his labor he shall have, not a specific interest in the business, but a given sum of money, even in proportion to the quantum of profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is as to third persons a partner; and no arrangement between the parties themselves can prevent it.' Ex parte Hamper, Stark's Law of Partn. 137. Cary, however, defends the principle, upon which this distinction is based. He insists, that as the person, who is to receive a compensation for his labor in proportion to the profits of the business, without having a specific lien upon such profits to the exclusion of other creditors, it is for their interest that he should be compensated in that way, instead of receiving a fixed compensation, whether the business produced profits or otherwise; on the other hand, that if he stipulates for an interest in the profits of the business, which would entitle him to an account, and give him a specific lien or a preference in payment over other creditors, and giving him the full benefit of the increased profits of the business, without any corresponding risk in case of loss, it would operate unjustly as to other creditors; and therefore that it is perfectly right in principle, that he should be holden to be liable to third parties, as a partner in the latter case, but not in the first. Cary on Partn. 11, note i. I am inclined to think this distinction is a sound one, as regards the rights of third persons. But as between the parties themselves, it is perfectly competent for them to agree, that one shall have his full share of the anticipated profits, as a compensation for his labor or skill, without running any risk of absolute loss, except as to third persons, if instead of producing profits the business should prove a losing concern. Many of the cases, cited by the counsel for the plaintiffs in error, were those, in which the question arose between the immediate parties to the agreement, which was supposed to make them partners as between themselves; and they may therefore be reconciled with other cases, in which they were held to be liable as partners to third persons upon the principles before stated." Mr. Cary in the passage alluded to

cases vanishes, and they are in harmony with each other, as well as with common sense.[1] Let us proceed then to illustrate the doctrine by adverting to some of

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says: "It is not within the original object of this work to enter into any contested points, or to broach an opinion not immediately sanctioned by judicial decisions. In the present case, however, it may be allowable to depart from this rule, as the principle, on which the above distinction is grounded, seems to the author of this work perfectly clear and just. On the one hand, suppose a person is to receive a proportion of a given quantum of profits, by way of recompense for his labor, this cannot be productive of injustice to any of the creditors of the trader, for the trader's own interest will not suffer him to give a greater proportion of the profits than the particular adventure will well afford. As if the risk is worth ten per cent. he will not be satisfied with securing five per cent. only as his own return, but will probably offer an equal share of the profits above the five per cent. But suppose the adventure fails, and there is none or very little profit to be divided, the creditor is obviously in a better condition than if a sum certain had been given as wages; for as every undertaking must be attended with some expense, and it is usual to pay agents or servants before any return of profit can be fairly calculated upon, it would be unreasonable to say, that an agent or servant shall not be paid, until the trader's other creditors are satisfied, and whether those wages are paid by a proportion of the profits, or by a sum certain, which must be deducted from the profits, cannot be very material to the creditors. On the other hand, if the agent agrees for a part of the profits as such, and stipulates for an interest in the profits of a business, instead of a certain sum proportioned to those profits, *he obtains the right of an account*, and to the prejudice of the creditors may institute a suit against his employer, not for the recovery of his wages, but for an account of profits; and supposing him not to be thereby constituted a partner, might take his full share of the profits, having an obvious advantage over the other creditors; for in case of the trader's insolvency, his claim (still supposing him not to be a partner) would be prior to that of other creditors, whereas in the former case he has not a determinate interest in the profits, but on the event of the trader's becoming bankrupt, would be on the same footing with other simple contract creditors." See also Perrine *v.* Hankerson, 6 Halst. 2, 181; 3 Kent, Comm. Lect. 43, p. 25, note (b), 4th edit., where the learned commentator adopts with approbation the doctrine of Mr. Chancellor Walworth. See also Story on Contracts, § 352, 353, 357, and note.

[1] See Montag. on Partn. B. 1, Pt. 1, p. 10 to 12, 2d edit., where many of the cases are collected.

the more striking cases, in which it has been judiciously recognized and confirmed.

§ 40. Thus, where A., having neither money nor credit, offered to B., that if he would order certain goods to be shipped with A., upon adventure to foreign parts, if any profit should arise therefrom, B. should have one half for his trouble; and B. accepted the offer, and the goods were purchased accordingly, and charged to both A. and B. as joint debtors; and B. having been afterwards compelled to pay the whole debt, brought a suit against A.'s executors, to recover the value of the goods so purchased; on an objection taken, that A. and B. were partners in the adventure, and the action was not therefore maintainable, the court overruled the objection, and held, that *quoad* third persons, this was a partnership, for the plaintiff B. was to share half the profits; but, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending A. his credit.[1] In this case the purchase was on joint account, for the purpose of selling the same goods and dividing the profits; and therefore it might well be deemed a partnership, as to third persons, as for example, in favor of the seller of the goods, consistently with the distinction above stated. [So where several persons were engaged in running a line of stages from A. to B. and by the agreement between them one was to run at his own expense a portion of the route, and the others, in like manner, the residue; each being authorized to collect fare over the whole or any part of the route; the par-

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[1] Hesketh *v.* Blanchard, 4 East, R. 144, 146; Smith *v.* Watson, 2 B. & Cresw. 401; post, § 56, and note.

ties to settle monthly, and the fare so received to be divided in proportion to the length of each one's route, the party found to have received more than his share, to pay over to the other, the balance on each monthly settlement, this was held not to constitute a partnership between the parties, whatever it might be as between them and third persons.[1]]

§ 41. But a case, bringing the distinction to its strictest test, may easily be put, of factors, brokers, and other agents, who are employed to sell goods on account of their principals, and are to receive a commission out of the profits, or a proportion of the profits, or a particular percentage out of the price, or a part or the whole of the price, beyond a certain sum, for which the goods are sold, as a compensation for their services. In all such cases it has been constantly held, that the factors, brokers, and other agents, are not partners with their principals, as to third persons, and *à fortiori*, not between themselves and their principals.[2] It might be different, as to third persons (as we shall hereafter see), if the factor, broker, or other agent, were not only thus to receive a proportion of the profits, but also to bear a proportion of the losses.[3] So, where a lighter-man

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[1] Pattison *v.* Blanchard, 1 Selden, 186. And see Ellsworth *v.* Tart, 26 Ala. 733; Bonsteel *v.* Vanderbilt, 21 Barb. 26.

[2] Collyer on Partn. B. ch. § 1, p. 18 to 29. See Dixon *v.* Cooper, 3 Wils. 40; Benjamin *v.* Porteus, 2 H. Black. 590; Meyer *v.* Sharpe, 5 Taunt. R. 74; Rice *v.* Austin, 17 Mass. R. 197; 206; 3 Kent, Comm. Lect. 43, p. 33, 4th edit.; 2 Bell, Comm. B. 7, p. 623, 5th edit.; Withington *v.* Herring, 3 Moore & Payne, 30; Gibbons *v.* Wilcox, 2 Starkie, R. 45; Tobias *v.* Blinn, 21 Verm. 548; Gow on Partn. ch. 1, p. 18 to 20, 3d edit.; Ex parte Watson, 19 Ves. 451; Turner *v.* Bissell, 14 Pick. R. 192; Denny *v.* Cabot, 6 Met. R. 82; Bradley *v.* White, 10 Met. R. 305; Judson *v.* Adams, 8 Cush. 556; Pott *v.* Eyton, 3 Manning, Granger & Scott, R. 32; Burckle *v.* Eckhart, 1 Denio, R. 337; 3 Comst. 132.

[3] Smith *v.* Watson, 2 B. & Cresw. 401; Collyer on Partn. B. 1, ch. 1, § 1,

agreed with the owner of a lighter to work the lighter, and to receive half of the gross earnings, as his compensation therefor, he was held not to be a partner, even as to third persons; but it was merely a mode of compensation of his services.[1] So, where a person agreed to give his attendance and services in a grocery store, and for such attendance and services he was to receive a fixed salary, and also a commission of seven per cent., upon the profits of the business, from the owners, it was held, that this did not constitute him a partner, upon the ground, that a commission on the profits was distinct from an interest in the profits.[2] It might perhaps be more accurately said, that it was a mere mode of compensation for an agency. The like rule would apply, where a person should agree to depasture cattle on the lands of another, who was to be repaid for fattening the same, by equally dividing all the profits with the owner, above £20, the estimated value of the cattle, upon a resale.[3] [And where A. agrees to furnish a farm with a certain amount of teams and labor, and B. is to manage the farm, and give certain labor, the crops to be divided between them, this does not constitute a partnership.[4] So, where a paten-

p. 19, 2d edit.; Green *v.* Beesley, 2 Bing. N. Cas. 108. But see Mair *v.* Glennie, 4 M. & Selw. 240; [Explained in Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 74;] Perrott *v.* Bryant, 2 Younge & Collyer, 61, 67, 68.

[1] Ante, § 34; Dry *v.* Boswell, 1 Camp. R. 330; Collyer on Partn. B. 1, ch. 1, § 1, p. 21, 2d edit.; Gow on Partn. p. 19, 20, 3d edit.; Taggard *v.* Loring, 16 Mass. R. 336; Cutler *v.* Winsor, 6 Pick. R. 335; Cheap *v.* Cramond, 4 Barn. & Ald. 663, 670; Heimstreet *v.* Howland, 5 Denio, R. 68. See also Mohawk and Hudson Railroad Co. *v.* Niles, 3 Hill, N. Y. R. 161.

[2] Miller *v.* Bartlett, 15 Serg. & R. 137; Pott *v.* Eyton, 3 Manning, Granger & Scott, R. 32.

[3] Wish *v.* Small, 1 Camp. R. 331, note; Gow on Partn. p. 19, 20, 3d edit.; Rawlinson *v.* Clarke, 15 Mees. & Welsb. R. 292.

[4] Blue *v.* Leathers, 15 Illinois, 31.

tee of an article contracted with the defendant to act as manager of the business of manufacturing the article which was to be marked with the patentee's name, the defendant furnishing all the capital, but the patentee having the management of the work, employing the workmen, making the purchases, &c., and was to receive a remuneration equal to forty per cent. on the capital stock, deducting all liabilities, but by express terms was not to be a partner with the defendant, this was held not to make the patentee a partner with the defendant although his remuneration depended distinctly upon the amount of profits.[1] But if the joint owners of a patent agree to make a common interest to sell, and to divide the net proceeds equally, a partnership is thereby created.[2]]

§ 42. It is upon the like ground, that, if the master of a ship contracts with the owner to receive a certain proportion of the profits of the voyage, in lieu of wages and primage, this alone will not constitute him a partner with the owner in the adventure *inter sese*, whatever may be the case as to third persons.[3] So, seamen en-

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[1] Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 67.

[2] Penniman *v.* Munson, 26 Vermont, 164; and see 25 Verm. 390.

[3] Mair *v.* Glennie, 4 M. & Selw. 240.—In this case, by agreement the master of the ship was to have, in lieu of wages, primage, &c., one fifth share of the profit or loss of the intended voyage on ship and cargo, and was to follow the instructions of the owner of the ship and cargo, and do all the business himself that he could do, and for the rest make the best bargains he could. The voyage was to Havana, and to take in a return cargo for the Baltic. The owner became bankrupt during the voyage, and had mortgaged the ship to A. & Co. for advances; who had not taken possession of the ship upon her return, and had also become bankrupts. The ship and cargo had been sold, and the suit was by the assignees of the owner against the assignees of the mortgagers, for the proceeds. One question was, whether the master, under the agreement, was a partner in the ship and cargo, for the voyage. The court held that he was not. On this occasion Lord Ellenborough said:

gaged in the whale fisheries, who are to receive a certain proportion of the profits or proceeds of the voyage after the sale thereof, in lieu of wages, are not deemed *inter sese*, or as to third persons, partners with the owner and master therein; but their shares are treated, as in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty, on the sale of the oil or fish, when it has taken place; and thus they become entitled to wages to the extent of their proportion in the produce of the voyage.[1] It would be manifestly against the common understanding in all such voyages, to consider them partners *inter sese*.[2]

" And upon this point, it has been contended, that the captain was virtually a partner. But on what ground has it been so contended? The ground is, because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo, but, according to that mode of argument, every seaman in a Greenland voyage would become a partner in a fishing concern. There is no pretence, therefore, for saying, that the captain was a partner, because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." [This case was commented upon and approved in Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 74.] This language is certainly very general; and perhaps in its application it ought to be limited to the very case before the court, which involved the point only whether there was a partnership between the parties; not whether there was a partnership as to third persons. It is indeed difficult, even with this qualification, to reconcile this case with the doctrine promulgated in some other cases; for as the master was to share both in the profit and losses of the voyage, it would seem that the owner and master were, *inter sese*, partners in the ship and cargo for the voyage, as well as in regard to third persons. At least there are authorities which sustain this view of the matter. See Ante, § 27, 32, 34, 41; Post, § 43, 44, 55 to 58; Smith *v.* Watson, 2 Barn. & Cresw. 401; Bond *v.* Pittard, 3 Mees. & Welsb. 357; Green *v.* Beesley, 2 Bing. N. Cas. 108; Perrott *v.* Bryant, 2 Y. & Coll. 61, 68; Collyer on Partn. B. 1, ch. 1, § 1, p. 20 to 24, 2d edit.

[1] Wilkinson *v.* Frazier, 4 Esp. R. 182; Baxter *v.* Rodman, 3 Pick. R. 435, 438, 439; Turner *v.* Bissell, 14 Pick. R. 192, 195.

[2] Rice *v.* Austin, 17 Mass. R. 197, 205, 206. — Mr. Justice Putnam in delivering the opinion of the court in this case said: " It cannot, however, be true, that all who participate in the profits are to be considered as partners, in respect to the concern or adventure, from which the profits of the voyage

And it would be equally against the common usage to treat them as partners as to third persons, and liable thereby for the outfits, advances, and other charges for the voyage to third persons, who should give credit for them. On the contrary, in all such voyages the owner of the ship is treated as solely responsible therefor, and the masters, officers, and crew are not even deemed tenants in common in the voyage, but are rather deemed entitled to several and distinct proportions of the proceeds thereof, as in the nature of wages, and in no sense as partners.[1] The case therefore is one where the sea-

arise. Seamen, for example, who are employed in the whale fisheries, are usually compensated for their services by a certain part of the profits of the voyage. Nevertheless, it has not been supposed, that this circumstance made the mariner a partner with the ship-owner, so as to render it lawful for a creditor of the mariner to take the whole cargo of oil for his private debt." See also Turner *v.* Bissell, 14 Pick. R. 192.

[1] See Fennings *v.* Lord Grenville, 1 Taunt. R. 241. — In Baxter *v.* Rodman (3 Pick. R. 435, 438), Mr. Chief Justice Parker, in delivering the opinion of the court, it being a case growing out of a contract for a whaling voyage, said: "The first objection is, that as by virtue of the contract, on which the master and crew engage in the voyage, they are to receive their pay out of the proceeds of the oil, they are joint owners and *quasi* partners, and so ought all to have joined in the action. If this were the law, it would be found to be exceedingly inconvenient, and would, no doubt, entirely break up the peculiar mode of conducting these voyages, which have been found to be so beneficial to those who carry them on, and to the country. That every seaman should be tenant in common with all the other seamen, the master, and the owners of the vessel, in all the oil, which may be taken on a whaling voyage, so that no action could be brought respecting it without joining all, and none could be sued without the whole, giving every seaman a right to discontinue the action, or to release the claim, or to receive payment for the whole, would be a state of things not suspected by the wise and enterprising men who have carried on the whale fishery. But we think it is not the law. The owners of the vessel and projectors of the voyage are the owners of the product of the voyage. The true meaning of the shipping contract is, that the men shall be paid out of the proceeds, in a stipulated proportion. It is an agreement as to the mode of compensation, and gives them no property in the oil, but only regulates the amount of compensation." In the common cod fisheries a different usage seems to prevail. There the

men are to participate in the profits, if any, but are to bear no part of the losses, if the profits are not sufficient to repay the owner.[1] In like manner, where persons, who are engaged as dredgers in the oyster fisheries, have no interest in the boats, nor in the fish caught, but the latter belong wholly to the owners of the boats; and the dredgers are to receive a share of the profits; such persons are not deemed partners in the adventure, either *inter sese*, or as to third persons; but it is treated as a mere mode of calculating the amount of wages due to them from the owners of the boats.[2] But it might be otherwise, if the dredgers were to share in the profits and losses according to certain agreed proportions.[3]

§ 43. In America the doctrine has been applied to other analogous cases, and pressed somewhat further. Thus, where a party was to receive, by way of rent, a portion of the profits of a farm or tavern, let to hire by him, it was held, that he ought not to be deemed a partner in the concern; but that it was to be treated

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fishermen generally share the fish caught, and the proceeds thereof, when sold by the owner, in certain fixed proportions. This has never been supposed to constitute them partners *inter sese*, or as to third persons, in the adventure. At most they could be deemed no more than tenants in common of the fish caught with the owner. The act of Congress manifestly contemplates them as having rights and interests in severalty, and gives each fisherman a several remedy against the vessel for his share of the fish caught, and of the proceeds when sold. Act of 19 June, 1813, ch. 2. See Houston *v.* Darling, 4 Shepl. R. 413.

[1] See Coppard *v.* Page, Forest, R. 1; Perrott *v.* Bryant, 2 Younge & Collyer, R. 61, 67, 68.

[2] Perrott *v.* Bryant, 2 Y. & Coll. R. 61, 67.

[3] Coppard *v.* Page, Forest, R. 1; Perrott *v.* Bryant, 2 Y. & Coll. R. 61, 68. But see Mair *v.* Glennie, 4 M. & Selw. R. 240. Stocker *v.* Brockelbank, 5 Eng. Law & Eq. R. 74.

as a mode of receiving compensation only.[1] Upon the like analogy, where A. advanced his funds to be invested by B. in live oak in Florida, to be procured, cut, and transported at the expense of B., but on account and risk of A., to the navy yard of the United States, and for his services and disbursements, B. was to receive half the profits, and A., for his risk and advances, was to have the residue of the profits; it was held, that the parties were not partners in the timber, nor could third persons be at liberty to treat it as partnership property. On that occasion the court said, that it was not true, that all, who participated in the profits, are to be considered as partners in respect to the concern or adventure, from which the profits arise.[2] And the case was put of shipments to India upon half profits (which are so generally practised in this country), in which it has never been supposed, that thereby the shippers and the owners of the ship became answerable for each other, or were in any way interested, as partners, in respect to the property, which constituted the original adventure, and which was undertaken to be carried to India for half profits, or in the return cargo, in which the proceeds were invested; but that the half profits were treated only as a mode of compensation for freight, disbursements, and charges in the course of the voyage.[3] [So, where an agreement was entered into between D. and W., under which D. was to furnish goods for a store, and pay all the expenses, and W. was to transact

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[1] Perrine v. Hankinson, 6 Halst. R. 181; 3 Kent, Comm. Lect. 43, p. 33, 4th edit.

[2] Rice v. Austin, 17 Mass. R. 197, 206.

[3] Rice v. Austin, 17 Mass. R. 197, 206; Turner v. Bissell, 14 Pick. R. 192, 195; 3 Kent, Comm. Lect. 43, p. 34, 4th edit.

the business of the store, and receive half of the profits, as a compensation for his service, it was held that they were not partners, and that D. only was liable for goods furnished.[1] The like rule was followed, where A. agreed to manufacture articles for B. who agreed to furnish the raw materials, and to pay A. such amount as should arise from the profits of the business, deducting the materials and incidental expenses of B., together with ten per cent. on the amount of sales.[2] So where a railroad corporation leased to A., a public house owned by the company, he paying a certain sum annually out of the net profits for the use of the furniture, and "one half of the net proceeds arising from keeping the house as a hotel," and keeping an account, open to their inspection, and giving his own time and attention, and having free passage over their road for himself and all persons employed by him, and all articles used by him in keeping the house, it was held, that the corporation did not thereby become a partner, and liable for supplies furnished the house by third persons.[3]] So, where A. and B. having entered into a contract with a turnpike company to make and complete a certain road, afterwards agreed with C. to let him have a share of the profits, if any, in making the second ten miles of the road, in proportion to the help he afforded in completing the same, the one half to be taken from A.'s part, and the other half from B.'s part; it was held,

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[1] Bradley v. White, 10 Metc. R. 303. See also Pott v. Eyton, 3 Manning, Granger & Scott, R. 32; Dunham v. Rogers, 1 Barr, R. 255; Rawlinson v. Clark, 15 Mees. & Welsb. R. 292.

[2] Judson v. Adams, 8 Cush. 556.

[3] [Holmes v. The Old Colony Railroad Co., 5 Gray, 58. The question does not seem to have been raised in this case, whether the railroad company had any corporate power to engage in the business of hotel keeping.]

that this agreement did not create a partnership between A., B., and C., but was only a mode of paying C. for his help and labor.[1]

§ 44. So, where the master of a ship agreed with the owner to take her for the purpose of getting employment in the freighting business, and engaged to victual and man her, and pay half the port charges, pilotage, &c.; and the owner was to pay the other half, together with eight dollars per month for one man's wages, and to put the vessel in sufficient order for business; and all the money so stocked in the vessel was to be equally divided between the master and the owner, each party accounting for the above; it was held, that the master was, *pro hac vice*, owner for the voyage undertaken, and the owner was not a partner, even as to third persons; for the agreement amounted to no more than a compensation out of the earnings of the vessel, after deducting certain fixed charges.[2] In this case the deduction was from the gross earnings. In another case the same principle was applied to the case of the net earnings. Thus, where the vessel was let to charter to the master for the season, and she was by the agreement to be at the risk of the owner, and after deducting the first

[1] Muzzy *v.* Whitney, 10 Johns. R. 226. — In this last case, as in Hesketh *v.* Blanchard (4 East, 144), the real question before the court was, whether the parties were partners *inter sese;* and the court did not decide, whether the parties were partners as to third persons, as the court did in Hesketh *v.* Blanchard. But the inference deducible from the language of the court leads to the conclusion that they were not partners either way. 3 Kent, Comm. Lect. 43, p. 34, 4th edit. But see Dob *v.* Halsey, 16 Johns. R. 34.

[2] Cutler *v.* Winsor, 6 Pick. R. 335; Taggard *v.* Loring, 16 Mass. R. 336. See Dry *v.* Boswell, 1 Camp. R. 329, 330; Dwinel *v.* Stone, 30 Maine, 388.

cost of the lumber, or whatever she might carry, the owner was to receive two fifths of the net proceeds, and the master was to purchase the cargoes at his own expense, to victual and man the vessel, and to pay the two fifths at the end of each trip; it was held, that the master was, *pro hac vice*, owner for the season; and that the general owner was not liable to third persons, as a partner on account of other shipments, not made within the scope of the agreement.[1]

§ 45. Other cases have arisen, where the same distinction has been still more strikingly adopted. Thus, where A., residing at a distance from a factory of cloths, occupied by B., entered into an agreement with B., in substance as follows: A. was to furnish a full supply of wool for the factory for two years; and B. was to manufacture such wool into broadcloths and satinets, in a good and workmanlike manner, according to the directions of A., and to devote the entire use of his factory to that purpose for the term; and the net proceeds of the cloths, after deducting the incidental expenses and charges of sale, were to be divided, so that A. should have fifty-five per cent., and B. forty-five per cent. thereof; and in the manufacture of satinets from such wool, A. was to pay fifty-five per cent., and B. forty-five per cent. of the cost of the warp; and the expense of

[1] Reynolds *v.* Toppan, 15 Mass. R. 370.—This case seems to have turned upon its own peculiar circumstances; otherwise, it might not seem easy at first view to reconcile it with the doctrine of Lord Ellenborough, in Dry *v.* Boswell, 1 Camp. R. 329, 330, where the distinction is expressly taken between sharing the gross earnings and sharing the net earnings. The former is not, the latter is, the case of a partnership. Ante, § 34, and note; Post, § 56. See also Cheap *v.* Cramond, 4 B. & Ald. 663, 668, cited post, § 56, note.

insurance on the work and cloth was to be borne by A. and B., in the same ratio as their interest was in the final division of the avails of the cloths; and in case of the destruction of any work or cloth by fire, the amount received of the insurers was to be divided between A. and B., according to the loss sustained by each; it was held, that under this agreement, A. and B. were not partners, either *inter se*, or as to third persons, and that B. had no other interest in the profits, than a compensation for his labor and materials by a percentage on the avails of the cloths.[1]

[1] Loomis *v.* Marshall, 12 Conn. R. 69. — The general reasoning of the cases on this subject was so fully gone into upon this occasion, that it may be acceptable to the learned reader to have an opportunity to examine it. Mr. Justice Huntingdon, in delivering the opinion of the court, said: "That the parties to this agreement did not intend to create a partnership, either as between themselves or third persons, is, we think, very obvious from the facts set forth in the motion, connected with the stipulations contained in the agreement; and if they are liable as partners, they are made so by construction of law. Those who were to furnish the wool, supposed they alone were responsible for the purchase-money; and those who were to perform the labor and provide the materials necessary to complete the manufacture of it, believed they alone were liable for the price of the labor and materials. If they are all jointly liable, their liability arises from the fact, that they have entered into a contract, which as between themselves and the plaintiff, controls their clear intention, if not express stipulation, to the contrary. And it is undoubtedly true that a person may expressly refuse to be responsible as partner, and yet, in the same instrument, which contains that refusal, may agree to such terms as will in law constitute him a partner. Whether these defendants have entered into such terms, is to be determined by a fair construction of the agreement which they have executed. While, on the one hand, we should be careful to adopt no rule of construction, which would enable parties, who are interested in the profits of business, as profits, to deprive the creditors of any portion of the fund, on which they have a just claim for the payment of the debts due to them; so, on the other hand (to use the language of Kent, Ch. J., in Post *v.* Kimberley, 9 Johns. R. 504), 'we must be careful not to carry the doctrine of constructive partnership so far as to render it a trap for the unwary.' We must in this, as other cases, look to the entire transaction, in order to judge correctly of its nature and tendency. And we think (as is said by Gould, J., in Coope et al. *v.* Eyre et

§ 46. The like decision was made under the following circumstances. By a written agreement A. agreed

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al. 1 H. Bl. 44), 'Cases of this nature should stand on broad lines, not on subtleties and refinements, the source of litigation and disputes.' A community of interest in land, does not of itself, constitute a partnership; nor does a mere community of interest in personal estate. There must be some joint adventure, and an agreement to share in the profit of the undertaking. Porter *v.* McClure et al. 15 Wend. 187; Green *v.* Beesley, 2 Bing. N. C. 108; Fereday *v.* Horden, Jacob, 144. This community of profit is the test to determine whether the contract be one of partnership; and to constitute it, a partner must not only share in the profits, but share in them as a principal; for the rule is now well established, that a party, who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner. The cases are collected and well arranged by Collyer in his Treatise on Partnership, 14, 15, et seq. and by Cary (on Partn.), 8, 9, 10, 11. They embrace factors and brokers, who receive a commission out of the profits of the goods sold by them; masters of vessels, who share in the profit and loss of the adventure in lieu of wages; seamen employed in the whale fisheries; shipments from this country to India on half profits; those, who receive, in the form of rent, a portion of the profits of a farm or tavern; and a variety of other adventures, to which it is unnecessary particularly to refer. Dry *v.* Boswell, 1 Camp. 330; Wish *v.* Small, Ib. note; Hesketh *v.* Blanchard, 4 East, 143; Mair et al. *v.* Glennie et al. 4 M. & S. 240; Dixon *v.* Cooper, 3 Wils. 40; Withington *v.* Herring et al. 5 Bing. 442; Rice *v.* Austin, 17 Mass. R. 197; Baxter et al. *v.* Rodman, 3 Pick. 435; Cutler et al. *v.* Winsor, 6 Pick. 335; Turner *v.* Bissell et al. 14 Pick. 192; Muzzy *v.* Whitney, 10 Johns. R. 226; Ross *v.* Drinker, 2 Hall, 415; Harding *v.* Foxcroft, 6 Greenl. 76; Thomson *v.* Snow, 4 Greenl. 264; Miller *v.* Bartlett, 15 Serg. & Rawle, 137. The rule, which these and other cases establish, is founded on the distinction which has been taken between agreements, by which the parties have a specific interest in the profits themselves, as profits, and such as give to the party sought to be charged as a partner, not a specific interest in the business or profits, as such, but a stipulated porportion of the profits, as a compensation for his labor and services. Ex parte Chuck, 8 Bing. 499. We are aware that this distinction has not received the approbation of Lord Eldon, who says, in Ex parte Hamper, 17 Ves. 404: 'The cases have gone further to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration, that if a trader agrees to pay another person for his labor in the concern, a sum of money even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner. It is clearly settled, though I regret it, that if a man stipulates, that, as the reward of his labor,

to furnish B. for one year with wool to be worked into satinets, and B. was to deliver to A. all the satinets, which the wool would make, and to find and pay for warps for the same; A. was to pay B. for working the wool, finding the warps, &c., forty per cent. on the sale of the satinets; each was to pay half the charges; A. was to have the whole direction of the sales, and if he should make sales himself, he was to have one and a half per cent. upon forty per cent. of the sales. It was held, that A. and B. were not partners *inter sese*, or

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he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner.' Id. 112; Ex parte Rowlandson, 1 Rose, 91; Ex parte Watson, 19 Ves. 458. We do not propose to examine the reasonableness of the doubts expressed by this distinguished Judge. Such inquiry we consider closed by a series of precedents, which we do not feel at liberty to disregard. They have settled principles, which have for a long period, regulated the agreements of parties, in cases to which they are applicable; and they ought not now to be questioned. The distinction, to which we have referred in our opinion, embraces the present case. The object of Marshall and his associates was, to have the wool manufactured into cloth. They resided at a distance from the factory, occupied by French and Hubbell, and were unacquainted with the business of manufacturing. They were willing to avail themselves of the opportunity, which the possession of the factory by French afforded, of having their wool worked into cloth, and of the skill of French and Hubbell, to prepare it for market. To secure and increase exertion, they agreed to give them, as a reward for their services and the materials, which they should furnish, a certain proportion of the 'net proceeds of all the cloths, after deducting incidental and necessary expenses of transporting and other proper charges of sale.' It is not expressed, in terms, to be for such compensation; but this is its legal meaning. In many of the cases, to which we have referred, the language of the agreements was not more explicit than in the one now under consideration; but looking at the entire transaction, such was considered the obvious meaning of the parties. French and Hubbell had no other interest in the profits, than such as arose from the agreement to pay them for their labor, &c., in a specific proportion of the amount of the sale of the manufactured article." See Brigham *v.* Dana, 29 Verm. 9.

as to third persons.[1] [So where A. agreed to serve B. as overseer on his farm for one year, A. to furnish a certain number of hands and horses, and to defray his and their expenses himself, and they were to be worked on B.'s farm in connection with B.'s hands and horses, and A. was to have one fourth of the crop for his compensation, this was held to constitute no partnership *inter sese*, as A. was to share only in the *gross* profits, and

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[1] Turner *v.* Bissell, 14 Pick. R. 192. — On this occasion Mr. Justice Wilde, in delivering the opinion of the court, said: "The question submitted is, whether the defendants are liable in this suit as partners. It is admitted, that they were not partners *inter sese;* for by the terms of their agreement, they had not a mutual interest in the profits and loss of the business, to which it related, which is essential to render a partnership complete. But the plaintiff's counsel contend, that both of the defendants participated in the profits of the business, and were thereby chargeable with respect to third persons. And it is certainly a well-established principle, that whoever participates in the profits of a trade, or has a specific interest in the profits themselves, as profits, is chargeable as a partner with respect to third persons. Gow on Partn. 14. But it is equally well established, that, where a party is entitled to or receives a given sum of money, in proportion to a given quantum of the profits, as a compensation for his labor and services, he is not thereby liable to be charged as a partner. Gow on Partn. 19. Thus, in Dry *v.* Boswell, 1 Camp. 329, the proprietor of a lighter agreed with a person to work his lighter, and to allow him therefor one half of the gross earnings, as a compensation for his labor; and it was ruled by Lord Ellenborough, that such an agreement did not constitute a partnership. The cases of the seamen employed in the whale fisheries, and of shipments to India on half profits, come within the same distinction. So factors and other agents, who receive commissions in proportion to the amount of sales, are interested in the profits, but as they have no interest in them, excepting so far as they may determine the amount of compensation for their services, they do not thereby become partners. And we are of opinion, that the present case falls within this distinction. The object of Bissell was to have his wool worked into cloth, and he agreed to allow Root, as compensation for manufacturing, an amount of money to be regulated by the amount of sales; and in no other manner was Root interested in the profits. The circumstance, that Root was to find warps, does not affect the principle, upon which the distinction as to compensation is founded. If Bissell had agreed with Root to pay him a certain sum for his services, and for supplying the

not at all in the loss.[1] But where A. gave B. possession of a stock farm for a term of years to improve, B. to have one third of the profits, and to pay no rent, the current expenses to be paid by the concern, and six per cent. interest to be allowed on advances made by either party, this contract was held to be a partnership.[2]]

§ 47. So, where a person was employed as an agent in conducting the business of a foundry for iron castings, at a fixed salary of $300, and in addition thereto, he was to receive one third of the profits of the foundry, if any were made, and he had nothing to do with the losses; and his employers were to find all the capital stock, and he was to give his services; it was held, that the agent was not, either as to his employers, or as to third persons, a partner; but that the case fell within that class of decisions, where the agent was to receive a share of the profits as a compensation for his labor and services.[3]

§ 48. These may suffice as illustrations of the distinction above alluded to. The whole foundation, on which it rests, is, that no partnership is intended to be created by the parties *inter sese;* that the agent is not clothed with the general powers, rights, or duties of a partner; that the share in the profits given to him is not designed to make him a partner, either in the

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warps, there could be no pretence for holding them as partners; and we can perceive no difference in principle, arising from the circumstance, that the compensation was to be determined according to the amount of sales." And see Hawes v. Tillinghast, 1 Gray, 289.

[1] Moore v. Smith, 19 Ala. 774.

[2] Tibbots v. Tibbots, 6 McLean, 80.

[3] Vanderburgh v. Hall, 20 Wend. R. 70. See 1 Smith, Lead. Cas. 404, and note, 2d edit.; Rawlinson v. Clarke, 15 Meeson & Welsby, 292.

capital stock, or in the profits, but to excite his diligence, and secure his personal skill and exertions, as an agent of the concern, and is contemplated merely as a compensation therefor. It is, therefore, not only susceptible of being treated purely as a case of agency; but in reality it is positively and absolutely so, as far as the intention of the parties can accomplish the object. Under such circumstances, what ground is there in reason, or in equity, or in natural justice, why in favor of third persons this intention should be overthrown, and another rule substituted, which must work a manifest injustice to the agent, and has not operated either as a fraud, or a deceit, or an intentional wrong upon third persons? Why should the agent, who is by this very agreement deprived of all power over the capital stock, and the disposal of the funds, and even of the ordinary rights of a partner to a levy thereon, and an account thereof, be thus subjected to an unlimited responsibility to third persons, from whom he has taken no more of the funds or profits (and, indeed, ordinarily less so), than he would have taken, if the compensation had been fixed and absolute, instead of being contingent?[1] If there be any stubborn rule of law, which establishes such a doctrine, it must be obeyed; but if none such exists, then it is assuming the very ground in controversy to assert, that it flows from general analogies or principles. On the contrary, it may be far more correctly said, that even admitting (what as a matter unaffected by decisions, and to be reasoned out upon original principles, might well be doubted[2]), that where each party is to take a share of

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[1] Cary on Partn. p. 11, note (i); Ante, § 37, note (1).
[2] Ante, § 36, 37.

the profits indefinitely, and is to bear a proportion of the losses, each having an equal right to act as a principal, as to the profits, although the capital stock might belong to one only,[1] it shall constitute, as to third persons, a case of partnership; yet that rule ought not to apply to cases, where one party is to act manifestly as the mere agent for another, and is to receive a compensation for his skill and services only, and not to share as a partner, or to possess the rights and powers of a partner.

§ 49. In short, the true rule, *ex æquo et bono,* would seem to be, that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then, that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then, that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons. It is upon this foundation, that the decisions rest, which affirm the truth and correctness of the distinction already considered, as a qualification of the more general doctrine contended for. And in this view it is difficult to perceive, why it has not a just support in reason, and equity, and public policy. Wherever the profits and losses are to be shared by the parties in fixed proportions and shares, and each is intended to be clothed with the powers, and rights, and duties, and responsi-

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[1] Grace *v.* Smith, 2 W. Bl. 998; Waugh *v.* Carver, 2 H. Bl. 235; Ante, § 27, 28.

bilities of a principal, either as to the capital stock, or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they intend a partnership. But where one party is stripped of the powers and rights of a partner, and clothed only with the more limited powers and rights of an agent, it seems harsh, if not unreasonable, to crowd upon him the duties and responsibilities of a partner, which he has never assumed, and for which he has no reciprocity of reward or interest. It has, therefore, been well said by Mr. Chancellor Kent, in his learned Commentaries, that "to be a partner, one must have such an interest in the profits, as will entitle him to an account, and give him a specific lien or preference in payment over other creditors. There is a distinction between a stipulation for a compensation for labor proportioned to the profits, which does not make a person a partner; and a stipulation for an interest in such profits, which entitles the party to an account, as a partner."[1] And Mr. Collyer has given the same doctrine in equally expressive terms, when he says, that in order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual; that is, each person must have a specific interest in the profits, as a principal trader.[2]

§ 50. The Roman law fully recognized the same distinction, treating the case as a mandate, and not as a partnership, unless the latter was the intention of the

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[1] 3 Kent, Comm. Lect. 43, p. 25, note (b), 4th edit.; Cary on Partn. p. 11, note (i); Ante, § 37, note (1); Post, § 57. See Rawlinson v. Clarke, 15 Mees. & Welsb. R. 292.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 17, 2d edit.; Id. p. 11; Id. p. 23.

parties themselves, where one person was employed to sell the goods of another, and was to receive for his services a portion of the profits, or the whole or a part of the excess of price beyond a given sum.[1] *Si margarita tibi vendenda dedero, ut, si ea decem vendidisses, redderes mihi decem; si pluris, quod excedit tu haberes; mihi videtur* (says Ulpian) *si animo contrahendæ societatis id actum sit, pro socio actionem; si minus, præscriptis verbis.*[2] In short, the Roman law seems principally, if not altogether, to have treated the case of partnership only as between the parties themselves, and does not even affect to give rights to third persons against them, founded upon any responsibility not contemplated by the partnership contract.[3] Voet, in speaking on the subject, manifestly deems every partnership, whether express or implied, to be a matter of consent between the parties. *Societas dividitur primo* (says he) *in expressam, quæ expressâ conventione fit, et tacitam, quæ contrahi dicitur, dum rebus ipsis et factis, simul emendo, vendendo, lucra et damna dividendo, socii ineundæ societatis voluntatem declarant.*[4]

§ 51. The same distinction is well known and fully recognized in the French law. Pothier has not, indeed, spoken with his usual clearness, or exactness, on the subject.[5] But Pardessus has expressed his opinion in

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[1] Ante, § 37.

[2] Dig. Lib. 17, tit. 2, l. 44; Pothier, Pand. Lib. 17, tit. 2, n. 4, and note, ibid.; Duranton, Droit Franc. Tom. 17, De Societé, n. 332; Pothier, De Societé, n. 13; Duvergier, Droit Civil Franc. Tom. 5, n. 45.

[3] See Duranton, Droit Franc. De Societé, Tom. 17, n. 334; Pothier, Pand. Lib. 17, tit. 2, n. 30 to 40; Ante, § 37.

[4] Voet, ad Pand. Lib. 17, tit. 2, § 2.

[5] See Pothier, Pand. Lib. 17, tit. 2, n. 4, and Pothier's notes, ibid. Pothier, De Societé, n. 13; Duvergier, Droit Civ. Franc. Tom. 5, n. 45; Ante, § 37.

the most direct and satisfactory manner. Thus (he says), whenever a merchant, instead of a fixed salary, agrees to give his agent a certain part of the annual profit, the agent is a letter of his services under an aleatory condition; but he is not a partner. He cannot make claim in that quality to any proprietary interest in the merchandise, bought with the funds of his principal, although he partakes of the profits thereof. He cannot, at least, without an express stipulation, have any voice in the deliberations of the partnership; and he will not be subjected to the contracts of the partnership in respect to third persons, unless, indeed, he has exceeded his powers, and then he is responsible as a mandatary.[1] So, when one person has trusted goods to another to be sold for him, and has agreed to give him the whole or a part of the price, which shall exceed a certain sum, this will not create a partnership between them; but only be a salaried mandate, or commission to the agent, thus undertaking the business.[2] Duvergier holds the same opinion, and has reasoned out the grounds thereof with uncommon acuteness and ability.[3] And, indeed, it seems to be

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[1] Pardessus, Droit Comm. Tom. 4, n. 969; Id. Tom. 2, n. 560.

[2] Pardessus, Droit Comm. Tom. 4, n. 969. See also, Id. Tom. 2, n. 306; Id. Tom. 3, n. 702.

[3] Duvergier, Droit Civ. Franc. Tom. 5, n. 48 to 56. — The following quotation clearly exhibits his views. "Enfin, il y a un usage fort répandu parmi les commercans, qui consiste à donner, à titre d'appointemens, à leur commis ou employés, une quote part des bénéficés de leur commerce. Cette stipulation semble, au premier coup-d'œil, réunir tous les élémens de la societé; elle a d'un autre côté, beaucoup d'analogie avec le mandat salarié. On comprend combien il est utile de savoir à laquelle de ces deux classes de contrats elle appartient réellement. Il est inutile de citer d'autres exemples. Ceux que je viens de présenter montrent assez, qu'il est trés difficile de démêler le véritable caracètre de ces conventions qui paraissent participer également de la societé, du mandat salarié, et du louage d'ouvrage.

the established doctrine of the French tribunals. This coincidence of doctrine, founded upon general reason-

Recherchons maintenant les principes, qui doivent diriger dans cette appréciation. La définition qui a été précédemment donnée du contrat de societé, me semble jeter sur ces délicates questions une lumière suffiante. Elle présente deux idées principales; elle montre dans le contrat de société deux élémens essentiels; d'abord, un fonds commun composé des mises particulières; en second lieu, une participation aux bénéfices produits par le fond social ainsi formé. Si donc j'analyse une convention, et que je ne voie point, qu'elle ait fait des choses, dont chacun des contractans était propriétaire exclusif, une chose commune à tous, je suis autorisé à conclure, qu'elle n'est point une societé. Je suis conduit à la même consequence, quoique un droit de propriété soit établi par l'effet de la stipulation, si les contractans n'ont point eu en vue de se partager des bénéfices résultant de l'état de communauté, qu'ils ont crée. Il ne suffit donc pas, qu'ils aient mis leurs propriétés en contact, sans les confondre, et qu'ils se soient procuré par là certains avantages, pour qu'ils soient associés; il ne suffit pas même, que les propriétés soient confondues, et que cette communication de droits ait accidentellement des résultats profitables; il faut que ce soit précisément en vue de ces résultats que la convention ait été formée. L'application de ces principes aûx diverses hypothèses, dont il vient d'être parlé, montre que, dans aucune d'elles, il n'y a societé. Entre le propriétaire de pierreries ou d'autres objets, et celui qui se charge de les vendre, moyennant la portion du prix, qui excédera une limite déterminée, il n'y a point de propriété commune. L'industrie de l'un s'exerce sur une chose, qui ne cesse point d'appartenir á l'autre. Il n'y a point, à proprement parler, de bénéfice, qui se partage entre eux; la somme totale, moyennant laquelle la vente est faite, est le prix des objets vendus; elle est la représentation, d'abord de la valeur intrinsèque de ces objets, et en second lieu des peines, des soins et même des frais qui ont pu être nécessaires pour les faire parvenir à un acheteur. Dans toute vente, le prix se compose de ces deux élémens; lorsque les marchés se concluent, sans intermédiarie entre l'acheteur et le vendeur, ce dernier touche les deux parties du prix; au cas contraire, l'une est percue par le propriétarie, l'autre par l'entremetteur. On devrait en dire autant, alors même, que le salarie de l'agent placé entre le vendeur et l'acheteur, consisterait en une certaine quotité du prix, à quelque somme qu'il s'élevât. C'est précisément ce qui se passe, tous les jours, dans les ventes ou autres négociations, qui se font par l'intermédiaire de courtiers. La commission ou droit de courtage est de tant pour cent sur le produit des opérations; et l'on n'a jamais songé à voir là des societés, parce qu'on a bien senti, que la chose dont la vente est faite, ne devient point la copropriété du vendeur et du courtier; qu'il n'y a point de bénéfices proprement dits dans une pareille opération, car il n'y a point augmentation de valeur produite par l'effet

ing, between foreign jurists and the municipal jurisprudence of the common law, as to the propriety of

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d'une mise en communaute; que seulement, il y a vente et distribution du prix entre deux personnes, qui y ont droit, à titre différent. Loresque quatre chevaux appartenant à deux maitres sont réunis pour être vendus, la propriété de chacun restant séparée, il est également évident, qu'il n'y a point de societé; car il n'y a rien de mis en commun, il n'y a point de copropriété formée par la réunion de propriétés distinctes. A la vérité, la combinaison des contractans a pour but et pour résultat d'augmenter la valeur vénale des choses, qui leur appartiennent; mais la société suppose l'existence d'une masse commune de bénéfices, à laquelle chacun vient puiser selon son droit. Ici, chacun et resté propriétaire de ce, qui lui appartenait avant la convention, il profite seulement de l'excédant de valeur, qui est survenu à sa chose. Dans la troisième espèce, ou l'on a voulu voir une société, il n'y a réellement qu'un mandat, ou l'établissement d'un état de communaute transitoire. Le fait, sur lequel s'explique la loi romaine citée par Pothier, n'est pas présenté avec une précision parfaite, et lorsqu'on veut indiquer ses conséquences avec l'exactitude convenable, on est obligé d'admettre une distinction. Si les deux voisins, qui ont eu la pensée d'achetur un fonds placé prés de leurs héritages, sont d'accord sur la portion, que chacun y droit prendre; celui qui fait l'acquisition agit, pour partie, en son nom personnel, et, pour partie, comme mandataire. Il n'e pas l'apparence d'une société; il n'y a pas même communauté, puisque le partage est fait à l'avance. Si le lot de chacun n'est pas déterminé, la propriété, du fonds sera indivise; mais, on le sait, l'indivision ne suffit point pour constituer la societé; elle établit seulement une communauté. Ce n'est pour les contractans qu'un état transitoire; leur but est le partage, et non la perception des bénéfices, que la chose commune peut produire. L'avantage que trouve chaque acheteur, dans la réunion à son héritage d'une partie du fonds acquis en commun, n'est pas un véritable bénéfice social. Il est même possible, qu'il y ait pour eux perte matérielle dans l'acquisition, que le fonds ne vaille pas ce qu'ils l'ont payé et qu'ils aient sciemment fait un marché désavantageux, pour éloigner un voisinage désagréable, ou pour exécuter des améliorations purement voluptuaires. On ne saurait trop insister sur la nécessité de conserver au mot bénéfices son sens exact et regoureaux; car c'est parce que l'on regarde bénéfices et avantages comme des expressions équivalentes, que l'on se méprend sur le caractère d'une foule de conventions. Si toutes celles qui procurent quelques avantages aux contractans, étaient des sociétes, cette qualification conviendrait à un nombre infini de contrats. L'arrangement que font les commerçans avec leurs commis, lorsqu'ils donnent à ceuxci, au lieu d'appointemens, une portion des bénéficés de leur maison, parait, plus que tout autre, réunir les élémens constitutifs de la societé. L'industrie du commis ne forme-t-elle pas sa mise ? No prendil point part aux bénéfices,

the distinction above stated, certainly affords no slight confirmation of its accuracy and entire conformity

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dans la véritable acception du mot? Me concourt-il pas aux pertes, puisque s'il n'y a pes de bénéfices il perd son travail? Malgré cette réunion de circonstances, les auteurs et les tribunaux decident, qu'il ne faut pas confondre un commis intéressé avec un véritable associé. Ils font ressortir les différences, qui existent entre leur position et leurs droits. Le commis n'a point, disent-ils, la copropriété du fonds social; il n'en dispose point librement et en mátire; il reste soumis à l'autorité et aux ordres de son patron; il peut être renvoyé par lui, sauf dédommagement; il ne participe point aux pertes; il n'est point personnellement tenu envers les tiers; ainsi il n'a ni les prérogatives ni les obligations d'un associé. Ces observations sont justes; cependant seules elles ne seraient pas décisives et l'on pourrait, à la rigueur, concevoir un associé réduit, par des conventions particulières, à une situation à peuprès semblable à celle qui vient d'être décrite. Rein n'empêche, en effet, de stipuler, que les choses mises dans la société resteront la propriété de l'un des associés, et que l'administration lui sera exclusivement réservée; que l'autre participera aux pertes, en ne recevant rein pour son travail; et qu'en cas d'insuffisance du fonds social, il ne sera point personnellement obligé au paiement des dettes. Mais la réunion de ces clauses fort extraordinaries n'etablirait pas encore une similitude parfaite entre l'associé et le commis. D'une part, lors même que les choses mises en société restent la propriété de celui, qui les y apporte, leur jouissance au moins est mise en commun et chacun des associés y a droit. Or le commis intéressé n'est point copropriétaire des capitaux de celui qui l'emploie, quoique ces capitaux soient fournis en pleine propriété, et non pas seulement pour la joissance. D'un autre côté, l'associé, qui donne son industrie comme mise sociale, s'engage à faire un travail déterminé mais independant; il a des devoirs à remplir envers la societé, mais il n'a point d'ordres à recevoir de ces co-associés. Le commis, au contraire s'oblige à executor la volonté du chef de la maison; il est, relativement à lui, dans un état d'infériorité et de subordination incompatible avec le caractère et les droits d'un associé. Ce rapprochement, qu'il serait facile de pousser plus avant, montre que, sous des apparences semblables, sont cachées des différences bien tranchées; qu'il ne faut pas, encore une fois, voir dans la participation à des bénèfices, un signe infallible de l'existence d'une société. L'associé et le commis intéressé ont cela de commun, qu'ils sont l'un et l'autre apples à recueillir une portion de bénéfices; mais la nature de leurs droits et la source à laquelle ils les puisent, n'en restent pas moins distincte set separées; l'un participe au gain, parce qu'il est copropriétaire de la chose qui le produit; et l'autre, parce qu'il a fait un travail pour lequel on lui a promis cette

to the true principles, which ought to regulate the subject.

§ 52. Thus much, at least, seemed proper to be said in vindication of the distinction at the common law, and the cases in support of it, which have been treated by some learned minds (as we have seen), as founded in too much subtlety and refinement, and as not reconcilable with acknowledged principles, or just juridical reasoning.[1] The charge might be fairly retorted, and the reasoning pressed, that the rule itself, to which the distinction is applied as an exception, is open to the same objection, and to others of a more serious nature.

§ 53. But waiving all such discussions, let us now proceed to the consideration of the various cases, in which the parties have been held to be partners, as to third persons, even when they were clearly not so, as between themselves. It is unnecessary to consider the cases, where the parties intend a partnership between themselves; for in such cases they clearly are, or at least may be held to be partners, as to third persons.[2] The converse rule, however, does not reciprocally apply at the common law; for persons are often held partners, as to third persons, where, either expressly or by just implication, they are not to be deemed partners between themselves.[3]

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espèce de salarie." See also the decisions of the French tribunals, cited by Duvergier, Id. p. 68, n. (2). See also Duranton, Droit Civ. Franç. Tom. 17, n. 329, 330, 331.

[1] Ante, § 48 to 51.

[2] Ex parte Hodgkinson, 19 Ves. 291, 294.

[3] Mr. Collyer seems to entertain some doubt as to the terms, nature, and extent of the doctrine on this point, and says: "In the preceding cases,

§ 54. The cases in which this liability as partners as to third persons exists, may be distributed into the following classes. First, where, although there is no community of interest in the capital stock, yet the parties agree to have a community of interest or participation in the profit and loss of the business or adventure, as principals, either indefinitely, or in fixed proportions. Secondly, where there is, strictly speaking, no capital stock, but labor, skill, and industry are

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although the parties manifested, by their agreement, an intention not to contract the relation of partnership, yet it was held, that such intention could not prevail against an express stipulation to share the profits; a stipulation, which as we have already seen, is the primary test of a partnership between the parties, and renders them liable to third persons. But the authorities have gone still further, and it has even been held, that an agreement to share the profits of an adventure, although not so expressed, as to create a partnership between the parties, may nevertheless, create a partnership, as between them and the world. In Waugh *v.* Carver, there are several expressions of Lord Chief Justice Eyre, which lead to this conclusion; and on the authority of those expressions, the case of Hesketh *v.* Blanchard was decided, in which it was held, that the agreement might constitute the parties as partners, *quoad* third persons, although under the circumstances it did not place them in that situation *inter se.*" And again: "Upon the whole, notwithstanding the doctrine laid down in Hesketh *v.* Blanchard, and some other cases, the general result of the authorities seems to be, that persons, who share the profits of the concern, are *primâ facie* liable as partners to third persons, but they may repel the presumption of partnership by showing, that the legal relation of partnership *inter sese* does not exist. With reference to the last of these two positions, it may be observed, that, in Hoare *v.* Dawes, the defendants, who were charged as dormant partners, rebutted the presumption of partnership by showing, that they had no communion of profit with the broker. So, where a person was charged as a dormant partner in the profits of a lighter, but it turned out, that he was to have only half the gross earnings as wages, it was held, that he was not a partner with the lighter-man, and therefore not liable for the repairs." Collyer on Partn. B. 1, ch. 1, § 3, 4, p. 59, 60, 2d edit. It does not appear to me, that the authorities quite justify the conclusion of Mr. Collyer, however reasonable it may seem to be. See post, § 56 to 59; Ex parte Rowlandson, 1 Rose, R. 89 to 91; Waugh *v.* Carver, 2 H. Bl. 235, 246.

to be contributed by each in the business, as principals, and the profit and loss thereof are to be shared in like manner. Thirdly, where the profit is to be shared between the parties, as principals, in like manner, but the loss, if any occurs beyond the profit, is to be borne exclusively by one party only. Fourthly, where the parties are not in reality partners, but hold themselves out, or at least are held out by the party sought to be charged, as partners to third persons, who give credit to them accordingly. Fifthly, where one of the parties is to receive an annuity out of the profits, or as a part thereof.

§ 55. And first, as to cases, where there is no community of interest in the capital stock; but there is a community of interest or participation in the profit and loss of the business or adventure, as principals.[1] It is this circumstance, that the parties are to act and share, *as principals*, which forms a prominent distinction between this class of cases and that where an agency exists, with a compensation therefor out of the profits. But the other circumstance is also important, that the parties are to share in the loss, as well as in the profit. Indeed, this is ordinarily laid down, as the true test of partnership in this class of cases.[2] A communion of profit generally implies a communion of loss in the

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[1] Coll. on Partn. B. 1, ch. 1, § 1, p. 25; Id. § 2, p. 53, 54, 55, 58, 2d edit.; Watson on Partn. ch. 1, p. 11, 12, 2d edit.; Id. p. 33; Ex parte Digby, 1 Deacon, R. 341; s. c. 2 Mont. & A. 735; 3 Kent, Comm. Lect. 43, p. 31, 32, 4th edit.; Ex parte Hodgkinson, 19 Ves. 291; Winship *v.* Bank of United States, 5 Peters, R. 529, 561; Ex parte Rowlandson, 1 Rose, R. 89; Hazard *v.* Hazard, 1 Story, R. 371.

[2] Green *v.* Beesley, 2 Bing. N. Cas. 108; Waugh *v.* Carver, 2 H. Bl. 235, 247; Holmes *v.* United Ins. Co. 2 Johns. Cas. 329, 331; Perrott *v.* Bryant, 2 Younge & Coll. 61, 68; Meyer *v.* Sharpe, 5 Taunt. R. 74.

limited sense already suggested, that is, that there can be no ascertained profits, until after all the losses are deducted therefrom.[1] There may, however, be, and often is, a stipulation in partnership contracts, that all the losses beyond what the profits will meet, shall be borne by one party only, or borne in a different proportion between the parties, from what they take in the profits.[2] But where the agreement either expressly, or by fair implication, admits, that the parties are to share in losses, as well as in profits, that circumstance will ordinarily, at the common law, be held to make them partners as to third persons, and in many cases also between themselves, upon the ground, that such is the proper and essential accompaniment of a partnership, and that it is inconsistent with the notion, that the share of the profits is designed to be a mere remuneration for services.[3]

§ 56. A few examples may serve to illustrate the principle. Thus, if the owners of a ship, owned by them as tenants in common, should employ the ship in a particular trade or adventure upon joint account, and were to participate in proportion to their interests in the profits and losses of the trade or adventure; they would be partners in the adventure *inter sese*, as well as to third persons, although they might still remain

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[1] Ante, § 20 to 23.

[2] Ante, § 23, 24; Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 2d edit.; Gilpin *v.* Enderby, 5 Barn. & Ald. 954; Bond *v.* Pittard, 3 Mees. & Wels. 357.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 19; Green *v.* Beesley, Bing. New Cas. 108; McIver *v.* Humble, 16 East, R. 173; 3 Kent, Comm. Lect. 43, p. 26, 4th edit.; Everett *v.* Coe, 5 Denio, R. 180.

tenants in common of the ship.[1] The like result would arise, if several tenants in common of goods should ship them, to be sold on joint account, and their respective shares in the proceeds were to be invested in other goods on their several and not joint account, on the return voyages, they would be partners in the adventure on the outward voyage, but not in the return voyage, unless the return goods were to be sold on joint account.[2] So, if the owner of a ship should agree with the master, that the vessel should be employed on a particular adventure or voyage for the benefit of both parties, and they were to share the profits and losses (not the gross profits or proceeds), indefinitely, or in certain fixed proportions; there, although the owner would still remain sole owner for the adventure, or the voyage, yet as both were to share the losses, as well as the profits thereof, they would be deemed partners.[3] The same doctrine would

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[1] Munford v. Nicholl, 20 Johns. R. 611; Post v. Kimberly, 9 Johns. R. 470; Saville v. Robertson, 4 Term R. 720, 725; Collyer on Partn. B. 1, ch. 1, § 1, p. 16, 17, 2d edit.

[2] Holmes v. United Insur. Co. 2 Johns. Cas. 331, 332.

[3] Ante, § 34, 42, 44; Dry v. Boswell, 1 Camp. R. 329, 330. But see Mair v. Glennie; 4 M. & Selw. 240; Stocker v. Brockelbank, 5 Eng. Law & Eq. R. 74; Cheap v. Cramond, 4 Barn. & Ald. 663, 668 to 670. — In this last case (which was one of sharing commissions), Lord Chief Justice Abbott, in delivering the opinion of the court, said: "And such an agreement is perfectly distinct from the cases, put in the argument before us, of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion. It is distinct also from the case of a factor receiving for his commission a percentage on the amount of the price of the goods sold by him, instead of a certain sum proportioned to the quantity of the goods sold, as was the case of Dixon v. Cooper (3 Wils. 40), wherein it was

apply, if the parties were to share the profits or the net profits; for in each of these cases there must be a deduction first made of all the charges and losses.[1] So, if two persons should enter into an agreement, that the one should buy goods on account of the other, and should proceed abroad with them, and there sell them, and they were to be equally interested in the profit and loss of the adventure; this would constitute a partnership between them.[2] So, if a person should agree with a broker, that the latter should purchase goods for the former, and should receive for his trouble a certain proportion of the profits arising from the sale of the goods, and should bear a certain proportion of the losses; such an agreement, although it would not vest any property in the broker in the goods so pur-

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held, that the factor was a competent witness to prove the sale. It differs also from the case of a person receiving from a trader an agreed sum, in respect of goods sold by his recommendation, as one shilling per chaldron on coals, or the like, for there there is no mutuality; and such a case resembles a payment made to an agent for procuring orders, and has no distinct reference in the terms of the agreement to any particular coals purchased by the coal merchant for resale, upon which a third person may become a creditor of the coal merchant, and probably could not in any instance be shown to apply in its execution to any such particular purchase." But see Reynolds *v.* Toppan, 15 Mass. R. 370, cited ante, § 44, note.

[1] Cheap *v.* Cramond, 4 B. & Ald. 668 to 670; Ex parte Rowlandson, 1 Rose, R. 89, 91, 92; Ex parte Hodgkinson, 19 Ves. 291, 294; Grace *v.* Smith, 2 W. Black. 998, 1000; Tench *v.* Roberts, 6 Madd. R. 145, note; Bailey *v.* Clark, 6 Pick. R. 372; Dob *v.* Halsey, 16 Johns. R. 34; Ante, § 34; Post, § 57, 58; Bond *v.* Pittard, 5 Mees. & Welsb. 357, 360, 361.

[2] Ex parte Rowlandson, 1 Rose, R. 89 to 91.—In this last case Lord Eldon said: "It was impossible to say, as to third persons, they were not partners, the ground being settled, that if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is as to third persons a partner, and no arrangement between the parties themselves could prevent it."

chased, or in the proceeds thereof, would yet, by reason of his participation in the profits and losses, render him liable, as a partner, to third persons.[1]

§ 57. Upon the like ground, where A., having neither money nor credit, offered to B., that if he would order with him certain goods from C. to be shipped upon a foreign adventure, and sold by A. abroad, if any profits should arise from them, B. should have half the profits for his trouble; and the goods were accordingly ordered and charged by C. to their joint account; it was held, that B. was jointly liable with A., as a partner to C. And the court there took the distinction, that *quoad* third persons it was a partnership, for B. was to share half the profits; but as between themselves, it was only an agreement for so much, as a compensation for B.'s trouble, and lending A. his credit.[2] So, where A. agreed with B. to convey by horse and cart the mail between particular places, at a certain price per annum, and to pay his proportion of the expense of the cart, &c.; and the money received by the carriage of parcels was to be divided between the parties, and the damage occasioned by the loss of parcels was to be borne in equal proportions; it was held, that they were partners *inter sese*, as well as to third persons. And upon that occasion Lord Chief Justice Tindal observed: "I have always understood the definition

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[1] Smith *v.* Watson, 2 B. & Cresw. 401; Meyer *v.* Sharpe, 5 Taunt. R. 74; Ex parte Langdale, 18 Ves. R. 300; s. c. 2 Rose, R. 444.

[2] Hesketh *v.* Blanchard, 4 East, R. 144, 146; s. c. ante, § 40; Meyer *v.* Sharpe, 5 Taunt. R. 74. See Collyer on Partn. B. 1, ch. 1, § 2, p. 50, 59, 60, 2d edit. — Mr. Collyer thinks, that in Hesketh *v.* Blanchard, 4 East, R. 144, the parties were partners *inter sese*, as well as to third persons; and there is certainly, in other authorities, strong ground to support that opinion. Ante, § 42, and note; Post, § 68.

of partnership to be a mutual participation of profit and loss." [1]

§ 58. Upon the like ground, where one person advanced funds for carrying on a particular trade, and another furnished his personal services only in carrying on the trade, for which he was to receive a proportion of the net profits; it was held, that they were partners *inter sese*, as well as to third persons.[2] And the principle was there fully recognized, which had been established in prior cases, that he, who is to take a part of the profits, shall by operation of law be made liable to losses, as to third persons; because by taking a part of the profits, he takes from the creditors a part of that fund, which is the security for the payment of their debts.[3] So, where A., B., and C. entered into partnership in the business of tanning hides, and it was stipulated that A. should furnish one half of the stock, to keep the tannery in operation, and should market and receive one half the leather, and that B. and C. should furnish the other half of the stock, and receive and market for the other half of the leather, and that in making purchases each should use his own credit separately; it was held, that they were partners as to third persons, as well as between themselves, as to stock sold to one of the partners; for the stipulation, as to the division of the manufactured article specifically among the partners, was

[1] Green *v.* Beesley, 2 Bing. New Cas. p. 108. See also Fromont *v.* Coupland, 2 Bing. R. 170; Collyer on Partn. B. 1, ch. 1, § 1, p. 19, 2d edit.

[2] Dob *v.* Halsey, 16 Johns. R. 34, 40; Everett *v.* Coe, 5 Denio, R. 180; 3 Kent, Comm. Lect. 43, p. 24, 25, 4th edit.; Collyer on Partn. B. 1, ch. 1, § 2, 2d edit.; Ante, § 34.

[3] Ibid.; Grace *v.* Smith, 2 W. Black. 998, 1000; Waugh *v.* Carver, 2 H. Black. 245; Hesketh *v.* Blanchard, 4 East, R. 144; Ante, § 27, 30, 32.

equivalent to a participation of profit and loss.[1] So, where three persons ran a line of coaches from one place to another, the route being divided among them into three sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section, and the money received from the passengers, as fare, deducting the tolls of the turnpike gates, was divided among them in proportion to the number of miles of the route run by each; it was held, that they were partners as to third persons, as well for torts, as upon contracts.[2]

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[1] Everet v. Chapman, 6 Conn. R. 347.

[2] Cham v. Bostwick and Wife, 18 Wend. R. 175. [Explained in Pattison v. Blanchard, 1 Selden, 186.] — Mr. Chancellor Walworth on this occasion said: "It is not necessary to constitute a partnership, that there should be any property constituting the capital stock, which shall be jointly owned by the partners. But the capital may consist in the mere use of property, owned by the individual partners separately. It is sufficient to constitute a partnership, if the parties agree to have a joint interest in, and to share the profits and losses arising from the use of property or skill, either separately or combined. Here the capital, which each contributed or agreed to contribute to the joint concern, was the horses, carriages, harnesses, drivers, &c., which were necessary to run his part of the route, and to be fed, repaired, and paid at his own expense. The only debts or expenses, for which they were to be jointly liable as between themselves, were the tolls upon the whole line; and the joint profits, which they were to divide, if any remained after paying the tolls, was the whole passage money received upon the entire line. Although it may be fairly inferred, that each party supposed, that the expenses of running his part of the line, exclusive of the tolls, would be equal to the distance run by him, it by no means follows, that any of them supposed, that the actual passage money or profits of the different parts of the line, would be in the same proportion; as it is a well-known fact, that the number of passengers, who travel in public conveyances, increase as you approach large market towns, or other places of general resort. The only object of the agreement to divide the passage money earned upon the whole line, among the different proprietors, must have been to give to those, who run that part of the line, where there was the least travel, a portion of the passage money on other parts of the route, as a fair equivalent for their equal contribution of labor and expense for the joint benefit of all. And as all the owners of the line were thus interested in every part of the route,

§ 58 *a.* On the other hand, where there was an agreement by a Railroad Company with certain persons, who were engaged in transporting merchandise from New York to various places in the West, by way of Hudson River and canals, that these carriers should deliver up their freight to the company at particular places, and the company should transport the goods from thence to their destination, and that the carriers should pay the company therefor a certain portion of the freight, according to certain distances; it was held, that this agreement did not make the company partners with the carriers in the transportation of the goods, either *inter sese*, or as to third persons.[1] The ground of this decision seems to have been, that there was no community of interests, or division of the profits of a joint concern, between the parties. The Railroad Company had no interest in the profits or losses of the Transportation

and were liable to the passengers, if they were unreasonably detained on the way, I am inclined to think, that, if the driver of either had refused to carry on the passengers over his part of the line without any sufficient excuse, either of the other parties, who happened to be present, might have employed another driver at the common expense to proceed with the team to the end of that route, although as between themselves the owner of that part of the line would be bound to pay such extra expense. And the same right would have existed, if the driver, by reason of intoxication or otherwise, was incapable of discharging his duty with safety to the passengers. Although the title to the coach and horses for the time being might not be so far vested in the partners, as to authorize any of them to take them out of the general owner himself under similar circumstances, the passengers might unquestionably be sent on by either of the others at his expense; or at the expense of all the owners of the line, who were interested in having it done, if he was unable to pay the expense." See also Wayland *v.* Elkins, 1 Starkie, R. 272, and Barton *v.* Harrison, 2 Taunt. R. 49; Wetmore *v.* Baker, 9 Johns. R. 307. See Fromont *v.* Coupland, 2 Bing. R. 170; Green *v.* Beesley, 2 Bing. New Cas. 108. [See the last two cases commented upon, in Pattison *v.* Blanchard, 1 Selden, 186.]

[1] Mohawk and Hudson Railroad Co. *v.* Niles, 3 Hill, N. Y. R. 162.

Company, on that part of the route which the latter were to accomplish; nor the Transportation Company, in the profit or loss in the railroad portion of the transportation. Each company was to receive a fixed proportion of the freight, whether the other would lose or gain on its own portion of the route, so that there was no community of profit or loss. Many other cases might be cited to the same effect; but those, which have been referred to, are sufficient to illustrate the doctrine already suggested under this head.

§ 59. In the next place, as to the class of cases, where, strictly speaking, there is no capital stock, but labor, skill, and industry are to be contributed by each party in the trade or business, as principals, and the profit and loss are to be shared in certain proportions between them. In this class of cases the like rule applies; and the parties are treated as partners, not only as to third persons, but also *inter sese*, upon the plain ground, that it is a trade or business carried on upon joint account, and that there is a complete communion of interest, both in the profit and loss thereof between them. It has, therefore, every distinctive mark of partnership. One or two cases will abundantly serve to present this doctrine in a clear and satisfactory light.[1] Thus, if A. and B. should agree to employ their joint labor and services and skill in business, as insurance brokers, and to divide the profits and losses between them, they would to all intents and purposes be held partners in that business. So, if A. and B. should agree to carry on the business of solicitors upon joint account, and to divide the profits and losses thereof in

[1] See the reasoning of Lord Chief Justice Eyre in Waugh *v.* Carver, 2 H. Black. 235.

certain proportions between them, this would make them partners, not only as to third persons, but *inter sese*.[1] Nor would the result be varied, if the parties agreed to share the profits between them, omitting any express provision as to losses; for in such cases they could by mere operation and intendment of law share the losses, upon the ground, that the losses must first be deducted before the profits can be ascertained; and also upon the more general ground which is so often recognized in the authorities, that every man who has a share of the profits of a trade or business, ought also to bear his share of the loss.[2] Indeed, all the authorities at the common law take the rule to be, that sharing the losses and the profits constitutes such a communion and mutuality of interest therein, as creates a clear partnership, as to third persons; and, in the absence of all contrary or inconsistent stipulations, as between themselves also.[3] Hence all the adventurers in a fishing voyage, who are to share in the profits and losses of the adventure according to certain proportions, and to contribute towards the outfit, are deemed partners in the adventure to all intents and purposes.[4] So, where a merchant in London was by agreement to recommend consignments to a merchant abroad, and the commissions on all sales of

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[1] See Hopkinson *v.* Smith, 1 Bing. R. 13; Tench *v.* Roberts, 6 Madd. R. 143; Smith *v.* Hill, 8 English, 173.

[2] Grace *v.* Smith, 2 W. Black. 998, 1009; Ex parte Gellar, 1 Rose, R. 297; Waugh *v.* Carver, 2 H. Black. 235; Cheap *v.* Cramond, 5 Barn. & Ald. 663; Bond *v.* Pittard, 3 Mees. & Welsb. R. 357, 360, 361. See Findle *v.* Stacy, Sel. Cas. in Ch. p. 9; Gow on Partn. ch. 1, p. 14, 15, 3d edit.; Collyer on Partn. B. 1, ch. 1, § 2, p. 54, 2d edit.; Ante, § 19 to 24.

[3] Geddes *v.* Wallace, 2 Bligh, R. 270; Peacock *v.* Peacock, 2 Camp. 45; Gow on Partn. 12, 13, 3d edit.

[4] See Coppard *v.* Page, Forr. R. 1; Perrott *v.* Bryant, 2 Y. & Coll. 61, 68; ante, § 42.

goods, recommended by the one to the other, were to be equally divided between them, without allowing any deduction for expenses; it was held, that they were not only partners in that business, as to third persons, but also as between themselves.[1]

§ 60. In the next place, as to the class of cases, where the parties are to share the profits between them, if any, as principals; but the losses are to be borne exclusively by one party.[2] It is here that the pressure of the general doctrine, that a participation in the profits, as profits, creates a partnership between them, is most severely felt, and is most difficult to maintain upon general reasoning. In all this class of cases it is the intention of the parties, that no partnership should exist between themselves; and the common law, in this respect, gives full force and effect to that intention. But in regard to third persons, the common law holds, that the mere right to participate in the profits creates a partnership between the parties, notwithstanding there is no participation in the losses, *ultrà* the profits, and it is not their intention to be partners. The doctrine here seems to be founded in part upon the consideration, that even in such a case there is incidentally, and to a limited extent, a participation in the losses, as well as in the profits; for before it can be ascertained, that there are any profits, the losses must first be deducted, and the residue only shared as profits.[3] But the main reason is, that, which has been already advert-

[1] Cheap *v.* Cramond, 4 Barn. & Ald. 663, 669, 670; Walton *v.* Sherburne, 15 Johns. R. 409, 421, 422.

[2] Watson on Partn. ch. 1, p. 17 to 27, 2d edit.; Ante, § 57.

[3] Ante, § 19 to 25, 55, 56, 57; Cheap *v.* Cramond, 4 Barn. & Ald. 470; Gilpin *v.* Enderby, 5 B. & Ald. 954; Ex parte Langdale, 2 Rose, R. 444; s. c. 18 Ves. 300, 301; Bond *v.* Pittard, 3 Mees. & Welsb. 357.

ed to, as the first foundation of the doctrine, to wit, that every man, who has a share of the profits of the trade or business, ought also to bear his share of the loss; for if any one takes part of the profit, he takes a part of the fund, on which the creditor of the trade relies for his payment.[1] Without inquiring into the true force of this mode of reasoning, a task, which would be a matter of supererogation, since, so far as the authorities go, it seems absolutely established, it may be useful to illustrate it by reference to some of the leading cases, in which it has been discussed and recognized.

§ 61. Thus, for example, if one person should engage with another in any trade or business, under an arrangement to divide the profits between them; but if there should not be any profits, but a loss, then that the loss should be borne by one only; that would make them partners, as to third persons, at all events.[2] On the like ground, if two solicitors should carry on business on joint account, and one should be entitled to receive a fixed sum, and also a share of the profits, and not be liable for any losses, they would be partners

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[1] Ante, § 27, 28, 32, 36, note (2); Grace v. Smith, 2 W. Black. 998, 1000. — Lord Eldon, in Ex parte Langdale (18 Ves. 300, s. c. 2 Rose, R. 444), said: "The true criterion is, whether they (the parties) are to participate in the profit. That has been the question ever since Grace v. Smith." Lord Chief Justice Eyre, in Waugh v. Carver, 2 H. Black. 235, 247, approved the doctrine, so promulgated in Grace v. Smith, as standing upon the fair ground of reason. Whether it does so, may certainly, if the question were new, admit of a good deal of argument. See ante, § 48, 49, 50, 51, and note 3. The point, however, now stands dryly upon the maxim, Ita Lex scripta est. See Green v. Beesley, 2 Bing. N. Cas. 108; Ante, § 57.

[2] Ex parte Langdale, 18 Ves. 300, 301; Geddes v. Wallace, 2 Bligh, R. 270; Jordan v. Wilkins, 2 Wash. Cir. R. 483; Gow on Partn. ch. 1, p. 16, 3d edit.; Gilpin v. Enderby, 5 B. & Ald. 954; Bond v. Pittard, 3 Mees. & Welsb. 357.

inter sese, as well as to third persons.[1] So, where two merchants agreed to enter into partnership for a certain term of years, and each was to furnish the same amount of capital, and one was to receive a certain annual sum out of the profits, if any, and if none, out of the capital, and at the expiration of the term he was to receive his full original capital by instalments; it was held, that they were partners *inter sese*, and also as to third persons.[2] So, where two ship agents, at different ports, entered into an agreement with each other to share in certain proportions the profits of their respective commissions, and discount on tradesmen's bills, employed by them in repairing ships confided to their care, but neither was to be answerable for the acts or losses of the other, but each was to bear his own; it was held, that they were partners as to third persons, although not as between themselves.[3] So, where a commission

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[1] See Bond *v.* Pittard, 3 Mees. & Welsb. R. 357, 360; Tench *v.* Roberts, 6 Madd. R. 145, note.

[2] Gilpin *v.* Enderby, 5 Barn. & Ald. 954.

[3] Waugh *v.* Carver, 2 H. Black. 235; Cheap *v.* Cramond, 4 B. & Ald. 663, 668; Emanuel *v.* Draugh, 14 Ala. 303.—In Waugh *v.* Carver, Lord Chief Justice Eyre said: "Whether these persons were to interfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety

merchant in London agreed with another commission merchant in Rio Janeiro, equally to divide between them the commissions on the sale of all goods recommended by the one house to the other; it was held, that as to third persons, they were partners in this business.[1]

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of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace *v.* Smith, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace *v.* Smith, and I think it stands upon the fair ground of reason. I cannot agree, that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them, he also makes out their bills in such a way as to determine the charge of commission to the ship-owners. With respect to the commission indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world." In this case, it seems that the Court considered "commissions to mean profits; and that the net commissions, and not the gross commissions, were divisible." Collyer on Partn. B. 1, ch. 1, § 1, p. 30.

[1] Cheap *v.* Cramond, 4 B. & Ald. 663.—In this case, it is not clear, whether the Court treated the case as one where the gross commissions, or the net commissions were to be divided, although the commissions were treated as if the word had been profits, and therefore undistinguishable from profits. The language of Lord Chief Justice Abbott, in delivering the opinion of the Court, was as follows: "And in support of this proposition,

§ 62. We may conclude this head with the remark, that the Roman law did not (as we have seen) ordi-

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the case of Waugh v. Carver was cited and relied on. And we are all of opinion, that the present case cannot be distinguished in principle from that, and that our decision must be governed by it. It is true, that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expenses before a division took place; and also that each party was to share in some specified measure with the other, in other parts of the profits of their respective business, such as warehouse rent, and discount upon tradesmen's bills. And it was contended, in this case, on the part of the plaintiffs, that the bankrupts and Ruxton were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant fact. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expense and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission, or proceeds of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one half, as in the case at bar, would, by the agreement, receive two fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although, in the case of Waugh v. Carver, the agreement was not confined to a division of the commission, but extended also to the moneys received in certain other parts of the transactions of the two houses, yet the principle of the decision is not affected by that circumstance, the principle being, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners with regard to those who deal with them therein, though they may not be partners *inter sese*. By the effect of such an agreement, each house receives from the other a part of that fund on which the creditors of the other rely for payment of their demands, according to the language of Lord Chief Justice De Grey, in the case of Grace v. Smith. And such an agreement is perfectly distinct from the cases put in the argument before us of remuneration made to a traveller, or other clerk or agent, by a portion of the sums received by or for his master or principal in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion. It is distinct also from the case of a factor receiving for his commission a percentage on the amount of the price of the goods sold by him, instead of a certain sum proportioned to the quantity of the goods sold, as was the

narily contemplate cases to be cases of partnership, except where the parties intended to create a partner-

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case of Dixon v. Cooper, wherein it was held, that the factor was a competent witness to prove the sale. It differs also from the case of a person receiving from a trader an agreed sum, in respect of goods sold by his recommendation, as one shilling per chaldron on coals, or the like, for there is no mutuality; and such a case resembles a payment made to an agent for procuring orders, and has no distinct reference in the terms of the agreement to any particular coals purchased by the coal merchant for resale upon which a third person may become a creditor of the coal merchant, and probably could not in any instance be shown to apply in its execution to any such particular purchase. But it is to be observed, that, even on a case of this nature, the inclination of Lord Mansfield's opinion, in Young v. Axtell, cited 2 Hen. Black. 242, was, that such an agreement might constitute a partnership. Of the case of Muirhead v. Salter, referred to in the argument, we have neither the facts nor the ground of decision brought before us with sufficient accuracy, to enable us to consider it as an authority on the present question. It may have been, that the division of the commission between the two insurance brokers was a solitary instance; that the assured had recognized the second broker, as being the person employed by himself; or that the court did not think fit, under all the circumstances of the particular case, to disturb the verdict of a jury of merchants, as to the effect of a division of the commission in that particular species of agency, the divided commission being, as I understand, payable for effecting the policy, and not for receiving the money from the underwriters, in the event of the loss, and payable whether any loss had occurred or not. So that we cannot consider that case as having contravened or weakened the authority of the decision in Waugh v. Carver. Upon the authority of this latter case, and for the reasons already given, we think the direction of the learned judge at the trial, and the verdict of the jury, are right, and that the rule for a new trial ought to be discharged." There is certainly some obscurity in that part of the opinion, which refers to the question as to the gross or the net commissions. If the learned judge meant to say, that a division of the gross commissions would make them partners, the case certainly is in conflict with other authorities. But if he meant, that the division was to be of the net commissions, deducting all charges, then it would be in harmony with those authorities. See ante, § 34, 44, 55 to 60. See Pearson v. Skelton, 1 Mees. & Welsb. 504. The same case is much more fully reported in 1 Mann. & Grang. R. 848, where the distinction between an interest in the gross profits, and that in the net profits, is clearly stated. His language on that occasion is quoted, post, § 220, note. Mr. Collyer understands Cheap v. Cramond, 4 B. & Ald. R. 663, to have decided that there is no difference between a division of the gross and a division of the net commissions.

ship, and the losses, as well as the profits, were to be shared in some proportions by each of them. The usual interpretation was, that if the agreement provided either for a distribution of the profits alone, or of the losses alone, in certain proportions, the other, which was omitted, would be presumed to be intended to be shared in the same proportion. *Illud expeditum est, si in unâ causâ pars fuerit expressa (veluti in solo lucro, vel in solo damno) in alterâ vero omissa; in eo quoque quod prætermissum est, eandem partem servari.*[1] And unless some provision was found in the agreement itself, touching the matter, the Roman law presumed, as a natural result from the contract, that the partners were to share in both, and to share equally. *Nam sicuti lucrum, ita damnum quoque commune esse oportet;*[2] *quod non culpâ socii contingit. Quoniam societas, cum contrahitur, tam lucri, quam damni communio initur.*[3] Still, however (as we have seen), the Roman law, if the parties clearly intended a partnership, did not prevent them from agreeing, in consideration of peculiar services or credit in aiding the partnership, that the partners should share the profits between them, if any, and that the one rendering such services, or credit, might be exempted from all losses beyond the profits.[4] But it does not appear, that the Roman law ever established a partnership in favor of third persons, against the intention of the parties, from the mere participation of profits, and *à fortiori*, where

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[1] 2 Inst. Lib. 3, tit. 26, § 3; Domat, tit. 8, § 1, art. 5; Ante, § 27, 50.

[2] Dig. Lib. 17, tit. 2, l. 52, § 4; Pothier, Pand. Lib. 17, tit. 2, n. 39; Domat, B. 2, tit. 1, § 1, art. 1.

[3] Dig. Lib. 17, tit. 2, l. 67, Introd.; Domat, B. 1, tit. 8, § 1, art. 1, 3, 4.

[4] Dig. Lib. 17, tit. 2, l. 29, § 1; Domat, B. 1, tit. 8, § 1, art. 9; Ante, § 37, 50.

there was an express provision against one party being liable for any losses.[1]

§ 63. The principles established in these three classes of cases[2] are commonly applied to dormant and secret partnerships, where the ostensible partners only are known or act, and yet other persons, who are to share the profits, are held responsible as partners to third persons, although they may not be so chargeable *inter sese*.[3] Thus, for example, if A. and B. should agree to carry on any trade or business for their joint and mutual account, to divide the profits and losses between them, and A. alone was to be known in the trade and business, and to be solely responsible for the debts and contracts thereof, and B. was to be a secret dormant partner, B. would, nevertheless, be deemed a partner as to third persons, and responsible to them for all the debts and contracts growing out of such trade or business.[4] The same rule would apply to a case, where it was even expressly agreed between the parties, that there should be no partnership between them, but they were merely to share the profits and losses, or the profits only, and one was to bear all the losses.[5]

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[1] Ante, § 50.

[2] Ante, § 55, 59, 60.

[3] 3 Kent, Comm. Lect. 43, p. 32, 4th edit.; Winship *v.* Bank of United States, 5 Peters, R. 529; Etheridge *v.* Binney, 9 Pick. 272.

[4] Hoare *v.* Dawes, 1 Doug. R. 371; Winship *v.* Bank of United States, 5 Peters, R. 529; s. c. 5 Mason, R. 176; Coope *v.* Eyre, 1 H. Black. 37; Geddes *v.* Wallace, 2 Bligh, R. 270; Baring *v.* Crafts, 9 Pick. R. 381; Brooke *v.* Washington, 8 Gratt. 248.

[5] Gow on Partn. ch. 1, p. 12 to 18, 3d edit.; Collyer on Partn. B. I, ch. 1, § 1, p. 11 to 27, 2d edit.; Id. § 2, p. 53 to 67; Id. B. 3, ch. 3, § 3, p. 368, 370, 371; Watson on Partn. ch. 1, p. 17 to 27, 2d edit.; Hesketh *v.* Blanchard, 4 East, R. 144; Smith *v.* Smith, 7 Foster, 244; Hill *v.* Voorhies, 22

§ 64. In the next place, as to the class of cases, where the parties are not in reality partners, but are held out to the world as such in transactions affecting third persons. In such cases, they will be clearly held partners, as to such persons.[1] This doctrine turns upon no peculiar principles of municipal jurisprudence; but is founded in the enlarged principles of natural law and justice, *ex æquo et bono*. For, wherever one of two innocent persons must suffer from a false confidence or trust reposed in a third, he who has been the cause of that false confidence, or trust, and is to be benefited by it, ought to suffer, rather than the other; and this must apply *à fortiori*, where the credit is given to a party solely upon the faith of the fraudulent allegation of a fact, which is known to such party at the time to be untrue. The reason of the doctrine is fully expounded by a late eminent judge in the following terms. "The definition of a partnership cited from Pufendorf is good, as between the parties themselves, but not with respect to the world at large. If the question were between A. and B., whether they were partners, or not; it would be very well to inquire, whether they had contributed, and in what proportions, stock, or labor, and on what agreements they were to

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Penn. St. R. 68; Brooke *v.* Washington, 8 Gratt. 248; Griffith *v.* Buffum, 22 Vermont, 181.

[1] 3 Kent, Comm. Lect. 43, p. 32, 33, 4th edit.; Post *v.* Kimberly, 9 Johns. R. 489; Ex parte Watson, 19 Ves. R. 458, 461; Fox *v.* Clifton, 8 Bing. R. 776; Collyer on Partn. B. 1, ch. 1, § 2, p. 60 to 64, 2d edit.; Parker *v.* Barker, 1 Bro. & Bing. R. 9; Goode *v.* Harrison, 5 B. & Ald. 147; Bond *v.* Pittard, 3 Mees. & Welsb. R. 357; 2 Bell, Comm. B. 7, ch. 2, p. 623, 624, 5th edit. See Bonfield *v.* Smith, 12 Mees. & Welsb. R. 405, the converse case, where the firm name was A. & Co., and the defendant held himself out as the sole partner then in the firm.

divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now, a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds, to which creditors would be liable, if they were to suppose, that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing."[1] Upon so clear and natural a doctrine, it seems unnecessary to cite at large the authorities in its support. They are uniform and positive to the purpose.[2]

§ 65. This last class of cases may arise from the express acknowledgments of the parties, or by implication or presumption from circumstances. Thus, if a person should expressly hold himself out as a partner,

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[1] Lord Chief Justice Eyre in Waugh *v.* Carver, 2 H. Black. 235, 246.

[2] Collyer on Partn. B. I. ch. 1, § 5, p. 53 to 64; Gow on Partn. ch. 1, p. 10, 3d edit.; Watson on Partn. p. 33, 34, 2d edit.; 3 Kent, Comm. Lect. 43, p. 31 to 33, 4th edit.; Hoare *v.* Dawes, 1 Doug. R. 371; Young *v.* Axtell, cited 2 H. Black. 242; Ex parte Langdale, 2 Rose, R. 444; s. c. 18 Ves. 300, 301; McIver *v.* Humble, 16 East, R. 169; Bond *v.* Pittard, 3 Mees. & Welsb. R. 357, 359.

and thereby should induce the public at large, or particular persons, to give credit to the partnership, he would be liable as a partner for the debts so contracted, although he should in reality not be a partner.[1] On the other hand, if a known partner should silently withdraw from the partnership, without giving any notice thereof, he would still remain liable to persons, who should continue to deal with it upon the faith and confidence, that he still remained a partner; for his silence, under such circumstances, would be equivalent to an affirmation of a continuing partnership.[2] But this subject will naturally occur in other connections in a subsequent part of these Commentaries, and needs not here be further dwelt upon.

§ 66. In the next place as to the class of cases where one of the parties is to receive an annuity out of the profits, or as a part thereof. And here it may be generally stated, that a person, who lends money to a firm, and is to receive therefor a fixed interest (whether usurious, or otherwise, is not material), or an annuity, certain as to amount and duration, will not thereby become, as to third persons, a partner in the firm; for, in such a case, there is no mutuality of profit with the firm, and no general participation in the casual and indefinite profits, which, as we have seen, constitutes one of the ingredients of partnership.[3]

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[1] Watson on Partn. ch. 1, p. 6, 2d edit.; Id. p. 33; Gow on Partn. ch. 1, p. 10 to 13, 3d edit.; Id. p. 23, 24; Collyer on Partn. B. 1, ch. 1, § 2, p. 53 to 67, 2d edit.; Guidon *v.* Robson, 2 Camp. R. 302; Young *v.* Axtell, cited 2 H. Black. 242.

[2] Collyer on Partn. B. 3, ch. 3, § 3, p. 368 to 376, 2d edit.; Godfrey *v.* Turnbull, 1 Esp. R. 371; Whitman *v.* Leonard, 3 Pick. 177; Griswold *v.* Waddington, 15 Johns. R. 57; Parkinson *v.* Carruthers, 3 Esp. R. 248; Stables *v.* Eley, 1 Carr. & P. 514; Graham *v.* Hope, 1 Peake, R. 154.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 26, 2d edit.

Cases of this kind often occur upon the retirement of a partner, leaving money or funds in the hands of the firm, and upon the decease of a partner, who bequeathes an annuity to his widow out of the profits; and in neither case will the retiring partner, or the widow, be held a partner as to third persons, as he or she certainly is not, as to the partners themselves.[1] It is true, that it may be said, that the retiring partner or widow has, in a certain sense, an interest in the profits. But the same suggestion may be made as to creditors of the firm. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits in the trade; and yet the lender is generally interested in those profits. He relies on them for repayment. And there is no difference, whether money be lent *de novo*, or be left behind in the trade by a retiring partner; or, whether the terms of the loan be kind, or be harsh.[2]

§ 67. The true criterion, by which we are to distinguish cases of this kind from cases in which there is a partnership as to third persons, is to ascertain, whether the retiring partner, or lender, or annuitant, is to receive a share of the profits, as profits, or, whether the profits are relied on only as a fund of payment; or, in other words, whether the profit, or premium, or annuity, is certain and defined, or is casual, indefinite, and depending on the accidents of trade. In the former case, it is a loan; in the latter, a partnership. The hazard of profit or loss is not equal and reciprocal, if the retiring partner, or lender, or annuitant, can receive a

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[1] Collyer on Partn. B. 1, ch. 1, § 1, p. 26, 27, 2d edit.; Grace *v.* Smith, 2 W. Black. R. 998, 1000; Waugh *v.* Carver, 2 H. Black. R. 235, 245.

[2] Grace *v.* Smith, 2 W. Black. R. 998, 1000.

limited sum only for the profits of the loan or other fund; and therefore the law will not deem him or her a partner, since there is an utter want of mutuality of right and interest in the profit.[1]

§ 68. There may be, and indeed sometimes is great nicety in the application of the doctrine; but, nevertheless, the distinction itself is ordinarily clear and satisfactory. Thus, if a person is to receive an annuity in lieu of profits, he will not be held to be a partner as to third persons; because such words negative the presumption, that the annuity is to be paid out of the profits; since it is not to vary in its amount with the profits, nor to depend, as to its duration, on the term or continuance of the partnership.[2] But if he is to receive a certain percentage on the profits, or on the amount of the business done, he will clearly be, as to third persons, a partner, since the amount to be received would rise and fall with the amount of the profits or business.[3] So (it has been said), if a retiring partner is entitled to receive a certain interest on the funds, which he leaves in the partnership, and also a fixed annuity for a certain number of years, if the partner shall so long live, in lieu of the profits of the trade, with a right to inspect the books of the partnership, he will be deemed a partner; for, taking the whole transaction together, it is apparent, that he is to be paid out of the profits.[4]

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[1] Grace v. Smith, 2 W. Black. R. 998, 1000; Waugh v. Carver, 2 H. Black. R. 235, 247.

[2] Collyer on Partn. B. 1, ch. 1, § 1, p. 27, 28, 2d edit.

[3] Young v. Axtell, cited 2 H. Black. R. 242; Waugh v. Carver, 2 H. Black. R. 235, 246, 247; Buckner v. Lee, 8 Georgia, 288.

[4] Bloxam v. Fourdrinier, cited 2 W. Black. R. 999; Collyer on Partn. B. 1, ch. 1, § 1, p. 28, 2d edit.; Id. § 2, p. 54.— This case seems to stand

§ 69. It is upon a similar ground, that, where a person is to receive an annuity of a fixed sum out of the profits of a trade or business, he is held to be a partner as to third persons; for in such a case the annuity will be payable out of the net profits, and will rise and fall according to the profits, if there be not enough profits to pay the annuity; and there will also be a lien on the profits therefor.[1] In short, in all cases of this kind, the real question to be solved is, whether the party is in effect to participate in the rise or fall of the profits, and has an interest in the profits, as such; or, whether he only looks to profits as a fund for payment of the annuity; but not exclusively to that fund. In the former case he is a partner; in the latter he is not. Questions of this sort also sometimes arise in cases, where a simulated partnership is resorted to,

upon the utmost verge of the law, even if it be at all maintainable. It differs from Grace *v.* Smith (2 W. Black. R. 999), principally in the circumstance, that the annuity was determinable upon the contingency of the death of the partner, and there was a right to inspect the books. But as the interest was fixed, and the annuity for a determinate term, although liable to be defeated by the happening of the contingency of the death of the party, it does not seem easy to see, how either the interest or the annuity can be properly treated as a payment to be made exclusively out of the profits. The right to inspect the books may seem more strongly to indicate a partnership; but ought it to be decisive? See Gow on Partn. ch. 1, p. 21, 22, 3d edit.; Cary on Partn. p. 3, 14, 171. Certainly an annuity of a fixed sum, determinable on the death of the annuitant, or of the partner, cannot, *per se*, be treated as creating a partnership as to third persons, when payable in lieu of the profits of the trade; for there is no mutuality in the profits, and no sharing of profit and loss; as it is not made payable out of the profits exclusively. See Ex parte Chuck, 8 Bing. R. 469; Young *v.* Axtell, cited 2 H. Black. R. 242; Holyland *v.* De Mendez, 3 Meriv. R. 184; Watson on Partn. ch. 1, p. 11, 12, 2d edit.

[1] Bond *v.* Pittard, 3 Mees. & Welsb. R. 357, 361; Ex parte Wheeler, Buck's R. 48; Ex parte Chuck, 8 Bing. R. 469; Ex parte Hamper, 17 Ves. R. 404, 412; Ante, § 66, 67.

in order to disguise a loan upon usurious interest; and then the court will look astutely to the real nature of the transaction. It may be clearly a case of usury between the parties, which will create no legal partnership as between themselves, although, they may as clearly be liable as partners to third persons.[1]

§ 70. We may conclude this part of our subject with the remark, that persons may not only be partners as to third persons, but also *inter sese*, where they are not interested personally, but are concerned in an official capacity only in the partnership, for the use and benefit of others. Thus, where a trustee for third persons is concerned in a partnership, but derives no profit personally therefrom, or an executor or administrator is, in pursuance of partnership articles, admitted into the partnership after the death of a deceased partner, he will be deemed to all intents and purposes, as to the other partners, as well as to third persons, a partner.[2] [So, if a debtor makes a deed of assignment to trustees for the benefit of creditors, empowering them to carry on the business in all respects as their own, and divide the net profits among such of the creditors as become parties to the assignment, in proportion to their debts, the trustees and creditors becoming parties to such a deed, are held partners as

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[1] Gilpin *v.* Enderby, 5 Barn. & Ald. 954; Morse *v.* Wilson, 4 Term R. 353; Collyer on Partn. B. 1, ch. 1, § 1, p. 38 to 41, 2d edit. See also Pothier, De Société, n. 22 to 27.

[2] Gow on Partn. ch. 1, § 1, p. 16, 3d edit.; Wightman *v.* Townroe, 1 M. & Selw. 412; Ex parte Garland, 10 Ves. 110; Barker *v.* Parker, 1 Term R. 295; Collyer on Partn. B. 3, ch. 3, § 4, p. 427, 428, 2d edit.; Owen *v.* Body, 5 Adol. & Ellis, R. 28.

to third persons, for any expenses incurred in carrying on the business;[1] but creditors are not made partners by a deed to trustees empowering them merely to wind up, and not to carry on, the business for the debtor, although they become parties to such deed.[2]] But if a person is not in the firm, and has no control or authority or interest, either in the capital stock or in the profits thereof,[3] and his *cestui que trust* is the party in interest (whether he be infant or an adult), the mere reservation to such person of a right to an account of the profits, and that the partnership shall be governed by his advice, will not (it should seem) constitute him a partner in any respect whatsoever. Thus, where it appeared, that a father, on the formation of a partnership, invested a sum of money in the partnership firm on behalf of his son, who was a minor; and it was stipulated, that the other partners should account with the father, as the trustee of his son, for one third profit of his son's capital, or any loss, that might accrue, and should be governed and directed by his advice in all matters relative to the business; it was determined, that this did not constitute the father a partner, the jury having found, that the money was not invested by him for his own benefit, and that he had not reserved to himself the power of drawing out the principal or profits, as trustee for his son.[4]

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[1] Hichman v. Cox, 36 Eng. Law & Eq. R. 400; and see Owen v. Body, 5 Ad. & El. 28.

[2] Coote v. Williams, 7 Exch. R. 205; 9 Eng. Law & Eq. R. 481; Janes v. Whitbread, 11 C. B. Rep. 406; 5 Eng. Law & Eq. R. 431.

[3] See Price v. Groom, 2 Welsby, Hurlstone & Gordon, 542.

[4] Barklie v. Scott, 1 Hudson & Brooks, Irish R. 83, cited Gow. on Partn. Supplement, London, 1841, ch. 1, § 1, p. 1.

CHAPTER V.

PARTNERSHIP — DIFFERENT SORTS OF.

§ 71. HAVING thus ascertained the true nature of the contract of partnership; the persons who are in law capable of being partners, or not; and what will constitute a partnership *inter sese*, and what merely as to third persons; we may now proceed to other considerations touching the subject, which seem necessary to be adverted to, as preliminaries to the more full discussion of the rights, duties, interests, powers, and responsibilities of partners, as well *inter sese*, as in respect to third persons.

§ 72. Partnerships then at the common law may, in respect to their character and extent, be divided into three classes; universal partnerships; general partnerships; and limited or special partnerships. By universal partnerships we are to understand those, where the parties agree to bring into the firm all their property, real, personal, and mixed, and to employ all their skill, labor, services, and diligence in trade or business, for their common and mutual benefit, so that there is an entire communion of interest between them. Such contracts are within the scope of the common law; but they are of very rare existence.[1]

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[1] [Lyman *v.* Lyman, 2 Paine, C. C. 11; Rice *v.* Barnard, 20 Verm. R. 472. — In this case the partnership was said to be, "not strictly a partnership, but rather a universal hotchpot of all the property and liabilities, present and prospective, of both the persons concerned."] In U. States Bank *v.* Binney, 5 Mason, R. 176, 183, the court said: "In respect to the general

§ 73. The Roman law fully recognized the same classification. *Societates contrahuntur, sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius.*[1] And in neither case was it necessary that the parties should contribute in equal proportions. *Societas autem coïri potest, et valet etiam inter eos, qui non sunt æquis facultatibus, cum plerumque pauperior opera suppleat, quantum ei per comparationem patrimonii deest.*[2] In that law universal partnerships were distinguished into two sorts; first, those, which were of all the property of the parties, present and future (*Universorum bonorum*[3]); and secondly, those, which extend only to all the gains, earnings, and profits of all the business done by them. (*Universorum, quæ ex quæstu veniunt.*[4]) The former sort was never deemed to be intended, unless it was explicitly stipulated; the latter was ordinarily presumed from the mere formation of a partnership.[5] *In societate omnium bonorum omnes res, quæ coëuntium sunt, continuo commu-*

law regulating partnerships, there does not seem any real dispute or difficulty. Partnerships are usually divided into two sorts, general and limited. The former is, where the parties are partners in all their commercial business; the latter, where it is limited to some one or more branches, and does not include all the business of the partners. There is, probably, no such thing as a universal partnership, if, by the terms, we are to understand, that every thing done, bought or sold, is to be deemed on partnership account. Most men own some real or personal estate, which they manage exclusively for themselves."

[1] Dig. Lib. 17, tit. 2, l. 5; Pothier, Pand. Lib. 17, tit. 2, n. 11; Inst. Lib. 3, tit. 26.

[2] Dig. Lib. 17, tit. 2, l. 5; Pothier, Pand. Lib. 17, tit. 2, n. 12.

[3] Pothier, De Societé, n. 28, 29, 43; Dig. Lib. 17, tit. 2, l. 5 to 12; Pothier, Pand. Lib. 17, tit. 2, n. 13 to 18; Domat, B. 1, tit. 8, § 3, art. 1, 4.

[4] Pothier, De Societé, n. 43; Domat, B. 1, tit. 8, § 3, art. 2; Voet, ad Pand. Lib. 17, tit. 2, n. 4, Tom. 1, p. 749; Vinn. ad Inst. Lib. 3, tit. 20, Introd.

[5] Pothier, De Societé, n. 29, 43; Domat, B. 1, tit. 8, § 3, art. 2, 3; Pothier, Pand. Lib. 17, tit. 2, n. 20, 21.

nicantur.[1] *Coïri societatem et simpliciter licet. Et si non fuerit distinctum, videtur coïta esse universorum, quæ ex quæstu veniunt; hoc est, si quod lucrum ex emptione, venditione, locatione, conductione descendit.*[2] *Quæstus enim intelligitur, qui ex operâ cujusque descendit.*[3] *Sed et si adjiciatur, ut et quæstus et lucri socii sint, verum est, non ad alium lucrum, quam quod ex quæstu venit, hanc quoque adjectionem pertinere.*[4]

§ 74. General partnerships are properly such, where the parties carry on all their trade and business, whatever it may be, for the joint benefit and profit of all the parties concerned, whether the capital stock be limited or not, or the contributions thereto be equal or unequal.[5] But where the parties are engaged in one branch of trade or business only, the same appellation is ordinarily applied to it. Thus, if two merchants are engaged in mercantile commerce and business on joint account, and also in manufacturing and other business solely on joint account, it is properly a general partnership. But, if the same merchants carry on no other business than that of commerce on joint account, they would be usually spoken of as engaged in a general partnership. The former case approaches very nearly to that of a general partnership in the Roman law, *Universorum, quæ ex quæstu veniunt.*[6] The latter would be distinguished by the Roman law, as a particular

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[1] Dig. Lib. 17, tit. 2, l. 1; Pothier, Pand. Lib. 17, tit. 2, n. 13.

[2] Dig. Lib. 17, tit. 2, l. 7; Pothier, Pand. Lib. 17, tit. 2, n. 20; Pothier, De Societé, n. 29, 43.

[3] Dig. Lib. 17, tit. 2, l. 8; Pothier, Pand. Lib. 17, tit. 2, n. 20.

[4] Dig. Lib. 17, tit. 2, l. 13; Pothier, Pand. Lib. 17, tit. 2, n. 20; Domat, B. 1, tit. 8, § 3, art. 2, 3; Pothier, De Societé, n. 43, 44, 45.

[5] Willet *v.* Chambers, Cowp. R. 814, 816; 2 Bell. Comm. B. 7, ch. 2, p. 621, 5th edit.

[6] Ante, § 73, Pothier, De Societé, n. 43.

partnership, *Negotiationis alicujus*.[1] The like distinctions prevail in the foreign law.[2]

§ 75. Special partnerships, in the sense of the common law, are those which are formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them.[3] They are more commonly called limited partnerships, when they extend to a single transaction or adventure only; such as the purchase and sale on joint account of a particular parcel of goods, or the undertaking of a voyage or adventure to foreign parts upon joint account. But the appellation may be applied indifferently, and without discrimination to both classes of cases. They therefore fall within the denomination of the Roman law, *Societas sive negotiationis alicujus, sive vectigalis, sive etiam rei unius*.[4] [But an association of persons, who agree in writing to pay a particular sum for the erection of a house of worship, or other public building, which when complete is to be owned by the subscribers in proportion to the amount paid by each, is not even a special partnership.[5]]

§ 76. At the common law partnerships are also sometimes divided into other kinds. (1.) Private partner-

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[1] Ante, § 73; Pothier, De Societé, n. 54; Domat, B. 1, tit. 8, § 3, art. 1; Watson on Partn. ch. 1, p. 1, 2d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 621, 5th edit.; Voet, ad Pand. Lib. 17, tit. 2, n. 5, Tom. 1, p. 750; Vinn. ad Inst. Lib. 3, tit. 26, Introd.; 3 Kent, Comm. Lect. 43, p. 30, note (a), 4th edit.; Civil Code of France, n. 1836 to 1842; Civil Code of Louisiana, art. 2800 to 2805; Id. 2795 to 2799; Pothier, De Societé, n. 54, 55.

[2] Ibid.

[3] Willett *v.* Chambers, Cowp. R. 814, 816; 2 Bell, Comm. B. 7, ch. 2, p. 621, 5th edit.; In re Warren, Daveis, R. 323.

[4] Ante, § 73; Pothier, De Societé, n. 54; Voet, ad Pand. Lib. 17, tit. 2, n. 5, p. 750.

[5] Woodward *v.* Cowing, 41 Maine R. 1.

ships, which are composed of two or more partners for some merely private undertaking, trade, or business; and (2.) Public companies, where a large number of persons are concerned, and the stock is divided into a large number of shares, the object of the undertaking being of an important nature, and often embracing public, as well as private interests and benefits.[1] The latter are also subdivided, (1.) into unincorporated companies, or associations; and (2.) into incorporated companies, fraternities (or guilds, as they were anciently called), and corporations existing under a charter of the crown or government, and having special powers and rights conferred thereby.[2] In both cases, however, the partnership, although commonly called a public company or association, is not, in contemplation of law, more than a mere private partnership; for in the sense of the law no company is a public company or association, whose interests do not exclusively belong to the public, and are not exclusively subject to the regulation and government of the legislature, or other proper public functionaries. Thus, for example, a college, a bank, a turnpike company, a bridge company, a manufacturing company, a company for mining, or for foreign trade or commerce, whether incorporated or not, is still but a mere private association.[3] Whereas a town, a parish, a hundred, a board of trade, or a treasury department, created by the government for public purposes, and exclusively regulated thereby, would be strictly a public company, whether incorporated or not.

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[1] Watson on Partn. ch. 1, p. 3, 4, 2d edit.; Collyer on Partn. B. 5, ch. 1 to 3, p. 721 to 793, 2d edit.; Gow on Partn. ch. 1, p. 2, 3, 4, 3d edit.

[2] Watson on Partn. ch. 1, p. 3, 4, 2d edit.; Comyn's Dig. *Trade*, B. D.

[3] Woodward *v.* Trustees of Dartmouth College, 4 Wheat. R. 518; Terrett *v.* Taylor, 9 Cranch, R. 43, 52.

§ 77. Unincorporated companies and associations differ in no material respect, as to their general powers, rights, duties, interests, and responsibilities, from mere private partnerships, unless otherwise expressly provided for by statute, except that the business thereof is usually carried on by directors, or trustees, or other officers, acting for the proprietors or shareholders; and they usually extend to some enterprise, in which the public have an ultimate concern.[1] But incorporated companies, or corporations, are governed strictly, as to their powers, rights, duties, interests, and responsibilities, by the terms of their respective charters; and the shareholders, or stockholders, are not personally or individually liable in their private capacities, unless expressly so declared by their charters, for the acts, or doings, or contracts of the officers, or members of the company, or corporation;[2] whereas in unincorporated companies and associations the shareholders and stockholders are personally responsible in their individual capacities for all acts of the officers and company, or association, in the same manner, and to the same extent, as private partners are.[3]

§ 78. In the French law, partnerships are distinguished into three sorts. (1.) Partnerships under a collective name, that is, where the trade or business of the partnership is carried on under a particular social

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[1] Watson on Partn. ch. 1, p. 3, 4, 2d edit.; Collyer on Partn. B. 5, ch. 1, § 4, p. 764 to 771, 2d edit.; Id. ch. 1, § 2, p. 734; 2 Bell, Comm. B. 7, ch. 2, p. 627, 628, 5th edit.

[2] Watson on Partn. ch. 1, p. 4, 2d edit.

[3] Watson on Partn. ch. 1, p. 3, 4, 2d edit.; Collyer on Partn. B. 5, ch. 1, § 1 to 4; Id. ch. 2; Id. ch. 3, p. 721 to 783, 2d edit. — Mr. Collyer, in the chapters above cited, has given a very full view of joint-stock companies, both at common law, and by statute, as well as of mining companies. See also 2 Bell, Comm. B. 7, ch. 2, p. 627 to 630, 5th edit.

name or firm, containing the names of some or of all of the partners.[1] (2.) Partnerships *in commandité*, or *in commendam*, that is, limited partnerships, where the contract is between one or more persons, who are general partners, and jointly and severally responsible, and one or more other persons, who merely furnish a particular fund or capital stock, and thence are called *commandataire*, or *commendataires*, or partners *in commandité*; the business being carried on under the social name, or firm of the general partners only, composed of the names of the general or complimentary partners; the partners *in commandité* being liable to losses only to the extent of the funds or capital furnished by them.[2] (3.) Anonymous partnerships are, where all the partners are engaged in the common trade or business, but there is no social name or firm, but a name designating the objects of the association, and the trade or business is managed by directors.[3] They correspond with our ordinary joint-stock companies, and other unincorporated associations. Similar distinctions are adopted in many other foreign countries, and in the Laws of Louisiana.[4] Special partnerships *in commandité* have also been recently introduced by statute into the jurisprudence of several States in the Union.[5] But the regulations applicable to such partnerships vary in different countries and States, and are strictly local, and therefore seem unnecessary to be

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[1] Code of Commerce of France, art. 20, 21; Watson on Partn. ch. 1, p. 2, 2d edit.; Pothier, de Société, n. 57.

[2] Code of Commerce of France, art. 23, 24; Watson on Partn. ch. 1, p. 2, 2d edit.; Pothier, de Société, n. 60, 102.

[3] Code of Commerce of France, art. 29, 30; Watson on Partn. ch. 1, p. 2, 2d edit.

[4] Code of Louisiana, art. 2796, 2810, 2883.

[5] 3 Kent, Comm. Lect. 43, p. 34, 35, 4th edit.

brought further under examination in the present Commentaries.

§ 79. In the Scottish law, partnerships are sometimes divided into ordinary partnerships, acting under a social name or firm; and joint adventures, where no firm is used; and public companies.[1] But in truth the two former are generally governed by the same rules. And therefore it may be properly said, that, in the Scottish law, partnerships are divisible into three classes; (1.) Ordinary partnerships; (2.) Joint-stock companies; (3.) Public companies.[2] In the former, the firm constitutes a distinct person in contemplation of law, capable independently of maintaining with third persons, as well as with the individual partners, the relation of debtor and creditor; and the partners, although jointly and severally liable for all the debts and contracts of the firm, are so, not as primary or principal debtors or contractors, but rather as guarantors or sureties of the firm.[3] Such a partnership may be either general or special. By general partnership the Scottish law does not intend the *Societas universorum bonorum* of the Roman law, but a partnership in the whole trade or manufacture carried on by the parties.[4] By special partnership, in the Scottish law, is intended a partnership limited to a particular branch of business, or excluding a particular branch, which would otherwise be included in a general partnership.[5] The second class, joint-stock companies, differs in several respects from the former class. (1.) By the credit raised with the public being

[1] 2 Bell, Comm. B. 7, p. 612, 621, 649, 656, 5th edit.
[2] 2 Bell, Comm. B. 7, p. 612, 621, 649, 656, 5th edit.
[3] 2 Bell, Comm. B. 7, p. 619, 620, 5th edit.
[4] 2 Bell, Comm. B. 7, p. 621, 5th edit.
[5] 2 Bell, Comm. B. 7, p. 621, 5th edit.

placed entirely on the joint-stock of the company, as indicated by its descriptive name. (2.) By a difference in the management and operation of the association, as conducted, not by the shareholders personally, but by directors or other officers appointed by the association, and made publicly known. (3.) By the shares being made transferable. In joint-stock companies, the liability of the shareholders to creditors is, by the common law of Scotland, limited to the amount of their respective shares, and they are not, as in ordinary partnership, jointly and severally responsible for all the debts of the firm.[1] The third class, public companies, embraces such as are created by royal or parliamentary authority; and therefore they have conferred upon them such powers, privileges, and exemptions only, as by the charter and by law properly belong to them.[2]

§ 80. In this connection it seems proper also to advert to the various denominations given to partners, and which in our subsequent inquiries should be kept steadily in view, to prevent any mistakes and embarrassments in the application of cases and principles. Partners, then, are ordinarily divided as follows; (1.) Ostensible partners, or those, whose names are made known and appear to the world as partners, and who in reality are such.[3] (2.) Nominal partners, or those, who appear, or are held out to the world as partners; but who have no real interest in the firm or business.[4] (3.) Dormant partners, or those whose names are not

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[1] 2 Bell, Comm. B. 7, p. 627, 628, 5th edit.

[2] 2 Bell, Comm. B. 7, p. 656, 5th edit.

[3] Collyer on Partn. B. 1, ch 1, § 1, p. 3, 2d edit.; 1 Mont. on Partn. ch. 2, § 1, 2; Gow on Partn. ch. 1, p. 12, 3d edit.; 3 Kent, Comm. Lect. 43, p. 31, 4th edit.

[4] Ibid.

known, or do not appear as partners, but who nevertheless are silent partners, and partake of the profits, and thereby become partners, either absolutely to all intents and purposes, or at all events, in respect to third persons.[1] Dormant partners, in strictness of language, mean those, who are merely passive in the firm, whether known or unknown, in contradistinction to those, who are active, and conduct the business of the firm, as principals. [And it has been thought that although some of the partners are active managing partners, and have given public notice of their interest in the firm, yet if the business is conducted under the individual name of one of the firm, the others are dormant partners; so far at least, that it is not necessary to join them in a bill to enforce a debt due the firm, contracted by one ignorant of their interest in the concern.[2]] Unknown partners are properly secret partners; but in common parlance, they are usually designated by the appellation of dormant partners.[3] Similar designations also prevail in the Scottish law.[4]

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[1] Ibid.

[2] Bank of St. Marys *v.* St. John, 25 Alabama, 566.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 3, 2d edit.; 1 Mont. on Partn. ch. 2, § 1, 2; Gow on Partn. ch. 1, p. 12, 3d edit.; 3 Kent, Comm. Lect. 43, p. 31, 4th edit.; Hoare *v.* Dawes, 1 Doug. R. 371; U. States Bank *v.* Binney, 5 Mason, R. 176, 185.—In this last case the Court said: "It has been said, that this is a case of a secret partnership; that it was the intention of the Binneys, that their connection with it should be kept secret, and that the management of the business in the name of 'John Winship' shows this intention. In point of fact, there is no covenant or declaration in the articles of copartnership, by which the partners have bound themselves to keep it secret; or that the name of the Binneys should never be disclosed to any persons dealing with Winship in the partnership concerns. In point of fact, too, if the evidence is believed, Winship, immediately after its formation, and

[4] 2 Bell, Comm. B. 7, ch. 2, p. 622, 623, 5th edit.

§ 81. In respect to the objects of partnerships, it may be generally stated, that they are not confined to mere commercial business or trade; but may extend to manufactures, and to all other lawful occupations and employments, and to professional and other business;[1] as, for example, they may embrace the business of attorneys, solicitors, conveyancers, surgeons, apothecaries, physicians, mechanics, artisans, engineers, owners of

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during its continuance, constantly avowed it, and made it known, and obtained credit in the business of the firm thereby. He stated the Binneys to be partners; and this statement was generally known and believed by the public, and especially by persons dealing with Winship in respect to the business of the firm. If the jury believe this evidence, then in point of fact, whatever was the original intention of the parties, this was not a secret partnership in the common meaning of the terms. I understand the common meaning of secret partnership to be, where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where all the partners are publicly made known, whether it be by one, or all the partners, it is no longer a secret partnership; for this is generally used in contradistinction to notorious and open partnership. And it makes no difference in this particular, whether the business of the firm be carried on in the name of one person only, or of him and company. Even if some of the partners intend to be such secretly, and their names are disclosed against their wishes and intentions; still, when generally known and avowed by any other of the partners, the partnership is no longer a secret partnership. If, therefore, in the present case, Winship, against the wishes and intention of the Binneys, did in the course of the business of the firm make known that they were partners, and who all the partners were, so that they became public and notorious, I should say, it was no longer a secret partnership in the common sense of the term. If secret in any sense, it must be, under such circumstances, in a peculiar sense. Sometimes dormant and secret partners are used as synonymous. But I take it, that dormant is generally used in contradistinction to active, and secret to open or notorious. However, nothing important turns in this case upon the accuracy of definitions, since it must be decided upon the principles of law applicable to such a partnership, as this in fact was, and is proved to be, whatever may be its denomination."

[1] 3 Kent, Comm. Lect. 43, p. 28, 4th edit.; Collyer on Partn. B. 1, ch. 1, § 1, p. 29 to 32, 2d edit.; Gow on Partn. ch. 1, p. 5, 3d edit.; Livingston *v.* Cox, 6 Barr, R. 364.

stage-coaches, farmers, drovers, brokers, bankers, factors, consignees, and even of artists and sculptors and painters. They may extend to all the business of the parties; or to a single branch thereof, or to a single adventure, or even to a single thing.[1] And so (as we have seen), stood the doctrine in the Roman law. *Societates contrahunter sive universorum bonorum, sive alicujus negotiationis, sive vectigalis, sive etiam rei unius.*[2] But there cannot lawfully be a partnership in a mere personal office, especially when it is of a public nature, and involves a distinct personal confidence in the skill and integrity of the particular party.[3]

§ 82. There may also be a partnership in some cases touching interests in lands, or in a single tract of land, which will be governed by the ordinary rules, applicable to partnership in trade or commerce.[4] Thus, for example, there may be a partnership in the working of a mine; for Courts of Equity constantly treat the working of a mine, as a species of trade; and apply the same remedial justice to such cases, as they do to ordinary partnerships.[5] So, real estate, held for general partnership purposes, has attributed to it the common qualities of partnership property, in whosesoever name the title may stand in law.[6] In short (as has been well ob-

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[1] Ante, § 73.

[2] Dig. Lib. 17, tit. 2, l. 5; Pothier, Pand. Lib. 17, tit. 2, n. 11 to 26.

[3] Collyer on Partn. B. 1, ch. 1, § 1, p. 31, 32, 2d edit.

[4] See Fall River Whaling Co. v. Borden, 10 Cush. 474; Jones v. Neale, 2 P. & H. (Virg.) R. 339.

[5] Collyer on Partn. B. 5, ch. 3, p. 783, 784, 2d edit.; Williams v. Attenborough, Turner & Rus. R. 70, 73; Story v. Lord Windsor, 2 Atk. 630; Wren v. Kirton, 8 Ves. 502; Crawshay v. Maule, 1 Swanst. R. 495; Fereday v. Wightwick, Tamlyn, R. 250; Sage v. Sherman, 2 Comstock, R. 417; Jeffreys v. Smith, 1 Jac. & Walk. 298; 1 Story, Eq. Jur. § 674.

[6] Gow on Partn. ch. 1, p. 32 to 35, 3d edit.; Id. ch. 5, § 2, p. 232; Id. § 4,

served), in the working of mines (such as a colliery), it seems difficult to establish, that there is an interest in the land, distinct from the partnership in trade; a mere interest in land, in which a partition could take place. For, when persons, having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may fairly be contended, that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade.[1]

§ 83. But although there is no positive incompetency at the common law of creating a partnership in the buying and selling of lands on joint account, and for the joint benefit of the parties, by way of commercial speculation and commercial adventure; yet such a contract must, from the nature of the case, and the positive rules of law and the Statute of Frauds, be reduced to writing; and then the stipulations of the parties will constitute the sole rule to ascertain their intent, and to enforce their respective rights.[2] The general rules of

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p. 340; Collyer on Partn. B. 2, ch. 1, § 1, p. 82 to 102, 2d edit.; 3 Kent, Comm. Lect. 43, p. 37 to 39, 4th edit.; Randall *v.* Randall, 7 Sim. R. 271; Cookson *v.* Cookson, 8 Sim. R. 529; Sigourney *v.* Munn, 7 Conn. R. 11; Hoxie *v.* Carr, 1 Sumn. R. 182, 186; Dale *v.* Hamilton, 5 Hare, R. 369; Lancaster Bank *v.* Myley, 1 Harris, 544.

[1] Per Lord Eldon, in Crawshay *v.* Maule, 1 Swanst. R. 518, 523, 526, 527. — Mr. Collyer has a valuable chapter on the subject of partnerships in mines, which contains a summary of the general doctrines of Courts of Equity touching them. See Collyer on Partn. B. 5, ch. 3, p. 783 to 792, 2d edit.

[2] Smith *v.* Burnham, 3 Sumner, R. 435, 458 to 471; In re Warren, Daveis, R. 323. [In England, the Vice-Chancellor, in an elaborate judgment, reviewing the authorities, has sustained an agreement for such a partnership, without any writing within the Statute of Frauds. Dale *v.* Hamilton, 5 Hare, R. 369. See also Smith *v.* Tarlton, 2 Barbour, Ch. R. 336; Fall River Whaling Co. *v.* Borden, 10 Cush. 474.]

law, applicable to ordinary commercial partnerships, are not applied to them;[1] nor are the ordinary remedies thereof enforced either at law, or in equity, *inter sese*, or as to third persons.[2] Thus, for example, the ordinary doctrine of the liability of dormant partners does not extend to partnerships formed for speculations in the purchase and sale of lands.[3] The present Commentaries are designed to treat principally of partnerships in the ordinary business of trade, navigation, commerce, manufactures, and arts, and other cases, will be incidentally discussed by way of illustration only, or to distinguish them from the general rules belonging to common partnerships.

§ 84. And here it may be proper to say a few words, as to the extent and duration of partnerships in point of time, and also as to the different modes, in which they may be formed. As to the first point, as partnerships are formed by the voluntary consent of the parties, they may be for life, or for a specific period of time, or conditional, or indefinite in their duration, or for a single adventure or dealing; and therefore dependent upon the mutual will or pleasure of the parties.[4] The period may be fixed by express stipulation, or it may

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[1] Patterson v. Brewster, 4 Edw. Ch. R. 352.

[2] [In Olcott v. Wing, 4 McLean, 15, it was held that the same principles governed partnerships for buying and selling land as ordinary partnerships, and that a Court of Equity would decree a sale of the lands after dissolution, and a division of profit or loss, according to the terms of the partnership.]

[3] Pitts v. Waugh, 4 Mass. R. 424; Smith v. Burnham, 3 Sumn. R. 435, 470, 471. [But see Brooke v. Washington, 8 Gratt. 248, contra.]

[4] Watson on Partn. ch. 7, p. 379, 2d edit.; Collyer on Partn. B. 1, ch. 2, § 1, p. 68, 2d edit.; Gow on Partn. ch. 5, p. 219 to 226, 3d edit.; Pothier, De Société, n. 64; 3 Kent, Comm. Lect. 43, p. 52 to 54; 2 Bell, Comm. B. 7, ch. 2, p. 630 to 633, 5th edit.

be implied from circumstances.[1] If no particular period is fixed by the parties for the duration of a partnership, it is deemed to exist during their mutual pleasure only, and of course is dissoluble by either of them, at any time when he chooses to withdraw therefrom.[2] When a particular term is fixed, it is presumed to endure until that period has elapsed; when no term is fixed, it is presumed to endure for the life of the parties, unless previously dissolved by some act or notice of one of the parties, or by operation of law. But in no case will the law presume, that the partnership is intended to continue beyond the life of the parties; and therefore if such is the object, it must be provided for by some express stipulation.[3] The causes, which will constitute a dissolution, or a cause of dissolution, will naturally come under review in our subsequent pages.

§ 85. The Roman law fully recognized the like principles. *Tamdiu societas durat, quamdiu consensus partium integer perseverat.*[4] So, in the Institutes it is said: *Manet autem societas eo usque, donec in eodem consensu perseveraverint. At, cum aliquis renunciaverit societati, solvitur societas.*[5] And again in the Digest: *Societas coïri potest vel in perpetuum, id est, dum vivunt, vel ad tempus, vel ex tempore, vel sub conditione.*[6] The Roman law went further than ours;

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[1] Collyer on Partn. B. 1, ch. 2, § 1, p. 68, 2d edit.; Crawshay v. Maule, 1 Swanst. R. 521, 525; Alcock v. Taylor, Tamlyn, R. 506.

[2] Ibid.; Featherstonhaugh v. Fenwick, 17 Ves. 229, 307, 308; Crawshay v. Maule, 1 Swanst. R. 522, 523; Ex parte Nokes, cited in Watson on Partn. ch. 7, p. 380, 2d edit.; Peacock v. Peacock, 16 Ves. R. 49; 2 Bell, Comm. B. 7, ch. 2, p. 630 to 634, 5th edit.

[3] Crawshay v. Maule, 1 Swanst. R. 521; s. c. 1 J. Wils. R. 181.

[4] Cod. Lib. 4, tit. 37, l. 5; 1 Domat, B. 1, tit. 8, § 5, art. 1, 2; 1 Domat, B. 1, tit. 8, § 3, art. 8, 9.

[5] Inst. Lib. 3, tit. 26, § 4.

[6] Dig. Lib. 17, tit. 2, l. 1; Pothier, Pand. Lib. 17, tit. 2, n. 10; Pothier,

and positively prohibited the duration of any partnership beyond the life of the parties; and therefore a provision, that the heir of one should share in the partnership, was held wholly void. *Nulla societas in æternum coitio est.*[1] *Nemò potest societatem hæredi suo sic parere, ut ipse hæres socius sit.*[2] *Idem (Papinianus) respondit, societatem non posse ultra mortem porrigi.*[3] The French law, and in general the law of the other nations of continental Europe, adopt similar principles.[4]

§ 86. In the next place, as to the different modes, in which partnerships may be formed. At the common law, no particular forms or solemnities are required to constitute a partnership between the parties. It is sufficient, that it is formed by the voluntary consent of the parties, whether that be express or implied; whether it be by written articles, or by unsolemn writings; or whether it be by tacit approbation, or by parol contract, or even by mere acts.[5] [And it is sufficient evidence to prove a person to be in partnership, that he and others had agreed to form a company, and that business had been carried on, on the basis of such agreement.[6]] It is indeed usual to have some writings pass between the parties, when a partnership is formed

De Societé, n. 64, 65; 1 Domat. B. 1, tit. 8, § 5, art. 1, 2; Id. § 13, art. 8, 9.

[1] Dig. Lib. 17, tit. 2, l. 70; Pothier, Pand. Lib. 17, tit. 2, n. 10; 1 Swanst. R. 509, note (a); Vinn. ad Inst. Lib. 3, tit. 26, § 4, n. 1, p. 698.

[2] Dig. Lib. 17, tit. 2, l. 35; Pothier, Pand. Lib. 17, tit. 2, n. 56; 1 Domat, B. 1, tit. 1, § 2, art. 2 to 5.

[3] Dig. Lib. 17, tit. 2, l. 52, § 9; Pothier, Pand. Lib. 17, tit. 2, n. 56, 57.

[4] Civ. Code of France, art. 1865 to 1871; Pothier, De Societé, n. 64, 65; Id. n. 146 to 154.

[5] Collyer on Partn. B. 1, ch. 1, § 1, p. 2, 3, 2d edit.; Watson on Partn. ch. 1, p. 4, 5, 2d edit.; Gow on Partn. ch. 1, p. 4, 5, 3d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 621 to 623, 5th edit.

[6] Owen *v.* Van Uster, 1 Eng. Law & Eq. R. 396.

for a specific term, or even during the pleasure of the parties, if the business is expected to be of a permanent nature, or of long duration. But this is a matter resting in the mere discretion and choice of the parties, and is by no means made indispensable by the law. And this also seems to have been the rule of the Roman law. *Societatem coire et re, et verbis, et per nuntium, posse nos, dubium non est.*[1] Voet has expressed the same doctrine in broader language. *Societas dividitur primo in expressam, quæ ex expressâ conventione fit, et tacitam, quæ re contrahi dicitur, dum rebus ipsis et factis, simul emendo, vendendo, lucra et damna dividendo, socii ineundæ societatis voluntatem declarant.*[2]

§ 87. The old French law required, that all general partnerships and partnerships *in commandité* should be reduced to writing and registered, unless when the concern was under one hundred livres in value.[3] And this continues in substance to be the rule under the modern Code of France.[4] Similar regulations are to be found in the laws of some other nations; but the Roman law seems more generally to have been followed.[5]

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[1] Dig. Lib. 17, tit. 2, l. 4; Pothier, Pand. Lib. 14, tit. 2, n. 6; 1 Domat, B. 1, tit. 8, § 3, art. 6.

[2] Voet, ad Pand. Lib. 17, tit. 2, § 2, Tom. 1, p. 748; Ante, § 50.

[3] Pothier, De Societé, n. 79, 80, 81.

[4] Code of Commerce of France, art. 39 to 44.

[5] 3 Kent, Comm. Lect. 43, p. 24, note (a), 4th edit.; 2 Bell, Comm. B. 7, ch. 2, p. 621 to 623, 5th edit.; Voet, ad Pand. Lib. 17, tit. 2, § 2, Tom. 1, p. 748; Tapia, Elem. de Jurisp. Mercant. Tom. 1, Lib. 2, cap. 2, § 1, p. 83, 84; Van Leeuwen's Comm. B. 4, ch. 23, § 1, 3.

CHAPTER VI.

RIGHTS AND INTERESTS OF PARTNERS IN PARTNERSHIP PROPERTY.

§ 88. HAVING disposed of these preliminary matters, we shall next proceed to the consideration of the rights and interests, powers and authorities, duties and obligations, liabilities and exemptions, of partners between themselves, as well as in relation to third persons. In treating of these points, so far as respects the partners themselves, we shall keep mainly in view cases, where a real partnership exists according to the intention of the parties, and there is a community of interest in the property, as well as in the profits of the trade or business, without any special stipulations, which may vary the application of the general principles of law. Of course, where any such stipulations exist, which are lawful in their nature or character, they properly constitute exceptions to those principles, and *pro tanto* may create new and peculiar relations and obligations.[1]

§ 89. And first, in relation to the rights and interests of the partners *inter sese*, in the partnership capital, stock, funds, and effects. Partners differ from mere part-owners of goods and chattels in several respects. The latter are either joint owners, or tenants in common, each having a distinct, or at least an independent, although an undivided interest in the property; and

[1] Ante, § 16 to 29.

neither can transfer or dispose of the whole property, or act for the others in relation thereto; but merely for his own share, and to the extent of his own several right and interest.[1] In cases of joint-tenancy of goods or chattels, indeed, the joint-tenants are said to be seized or possessed *per my et per tout*, by the half or moiety and by all; that is, they each of them have the entire possession, as well of every parcel, as of the whole;[2] or, as Bracton has expressed it: *Quilibet totum tenet, et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*[3] Hence it is said, that in joint-tenancy there is a fourfold unity, unity of interest, unity of title, unity of time, and unity of possession;[4] and the right to the whole belongs to the survivor.[5] But still each joint-tenant has an independent, and, in a certain sense, a distinct right and interest in the property during his lifetime, which cannot be disposed of by the other joint-tenant, but which he may severally himself dispose of, and thus sever the joint-tenancy; and he may now by statute, although not at common law, have an action of account against the other for his share of the profits derived from the common property.[6] On the other

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[1] Com. Dig. *Estate*, K. 1 to K. 10; Litt. § 321; Co. Litt. 200, a; Woodward *v.* Cowing, 41 Maine R. 12.

[2] 2 Black. Comm. 182; Id. 399; Litt. § 288; Co. Litt. 186, a; Bac. Abr. *Joint-tenancy and Tenancy in Common* (C).

[3] Bracton, Lib. 5, tr. 5, c. 26, p. 430; Co. Litt. 186, a.

[4] 2 Black. Comm. 180, 399.

[5] 2 Black. Comm. 183, 184; Com. Dig. *Estate*, K. 3, K. 4; Litt. § 281, 282; Co. Litt. 181, 182, a.

[6] 2 Black. Comm. 183; Com. Dig. *Accompt*, B. — There is no small subtlety in the language of our Law Books on this subject. Thus, Blackstone uses language to the effect, that the interest of two joint-tenants is not only equal or similar, but it is one and the same; that survivorship is the natural and necessary consequence of the union and entirety of their

hand, tenants in common hold undivided portions of the property by several titles, or in several rights, although by one title; but they have their possession in common and undivided; so that there may be an entire disunion of interest, of title, and of time among them.[1] Hence it is said, that tenants in common properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between them; but the share of the deceased tenant in common goes to his personal or real representative.[2]

§ 90. From the resemblances thus existing between cases of joint-tenancy and tenancy in common and partnerships, it has been sometimes said, that partners are either tenants in common of the partnership effects, or

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interests; that one has not a distinct moiety from the other; and that if by any subsequent act, as by alienation or forfeiture of either, the interest becomes separate and distinct, the joint-tenancy instantly ceases. 2 Black. Comm. 183, 184. And yet it is palpable, that one joint-tenant may transfer or alien his own right severally, and thereby sever the joint-tenancy. And therefore it has been well observed by Lord Coke, after quoting the language of Bracton (already cited), that joint-tenants hold *per my et per tout*; "And albeit they are so seized, yet *to divers purposes* each of them hath but a right to a moiety, as to enfeoff, give or demise, or to forfeit." Co. Litt. 186, a. And afterwards he adds: "And where all the joint-tenants join in a feoffment, every one of them in judgment of law doth but give his part. If an alien and a subject purchase land jointly, the king upon office found shall have a moiety; and Littleton afterwards in this chapter (§ 291) saith, that one joint-tenant hath one moiety in law, and the other the other moiety." Co. Litt. 186, a. Now, what is this but admitting, that joint-tenants have in reality distinct and independent interests, capable of a distinct alienation; and that each has but a moiety, concurrent and undivided, with the other in the property, with a right of survivorship in case no severance takes place?

[1] Com. Dig. *Estate*, K. 8; 2 Black. Comm. 192; Litt. § 292; Co. Litt. 188, b.

[2] Com. Dig. *Estate*, K. 8; 2 Black. Comm. 194, 399; Abbott on Shipp. ch. 3, p. 68, Amer. edit. 1829.

joint-tenants without the benefit of survivorship.[1] But this language is by no means accurate; and perhaps no case could better exemplify the truth of the maxim, *Nullum simile est idem.* Partnership differs from joint-tenancy in two important particulars. In the first place, joint-tenants cannot dispose of the interest of each other in the joint property, although they hold *per my et per tout;* but each has the sole power of disposing of his own interest therein;[2] whereas, in cases of partnership, each partner is not only a joint owner with the others of the partnership property, but he also has full power to dispose of the entire right of all the partners therein, for the purposes of the partnership, and in the name of the firm. In the next place, there is no survivorship in cases of partnership, as there is in joint-tenancy. This has been the doctrine of the common law for more than three centuries, and indeed is probably coeval with the business of joint trade and commerce in England. Thus, Lord Coke, in speaking of joint-tenancy in chattels and debts, contracts and duties, where the right of survivorship ordinarily exists, adds: "An exception is to be made of two joint merchants; for the wares, merchandises, debts, or duties, that they have as joint merchants, or partners, shall not survive, but shall go to the executors of him, that deceaseth; and this is *per legem mercatoriam,* which (as hath been said) is a part of the laws of this realm for the advancement and continuance of commerce and

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[1] Watson on Partn. ch. 2, p. 65, 2d edit.; Gow on Partn. ch. 2, § 1, p. 32, 3d edit.; West *v.* Skip, 1 Ves. R. 242; 3 Kent, Comm. Lect. 43, p. 36, 37.

[2] Co. Litt. 186, a; Litt. § 291; Ante, § 89, note b; West *v.* Skip, 1 Ves. R. 240, 242.

trade, which is *pro bono publico;* for the rule is, that *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*"[1] It might be added, that otherwise partnerships would never have been formed for purposes of trade, since the death of either partner might bring want or ruin upon his family, and the whole business would be full of perils and hazards, which might occasion losses far beyond any hope of reasonable gains and profits. Within the benefit of the rule, all persons engaged in any trade, foreign or domestic, were originally deemed merchants;[2] and now it is applied to all employments and business between two or more persons on joint account and benefit, whether they fall under the denomination of merchants, or not.[3] So strong is this doctrine, that even where persons are clearly joint-tenants of any property, and it is afterwards by them deliberately embarked in trade and business on joint account, as partners, such property will cease to be held by them in joint-tenancy, and will, in case of the decease of either, be no longer subject to the *jus accrescendi;*[4] for the joint-tenancy is thereby severed, and a partnership established in the property in lieu thereof.[5] Partnership differs quite as much

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[1] Co. Litt. 182, a; Com. Dig. *Merchant,* D.; 2 Brownlow, R. 99; Collyer on Partn. B. 2, ch. 1, § 1, p. 80, 81, 2d edit.; Jackson *v.* Jackson, 7 Ves. R. 535; 9 Ves. 591.

[2] 2 Brownlow, R. 99; Com. Dig. *Merchant,* A.

[3] Jackson *v.* Jackson, 9 Ves. 596, 597; Jeffreys *v.* Small, 1 Vern. R. 217; Collyer on Partn. B. 2, ch. 1, § 1, p. 76, 77, 80, 81, 82, 2d edit.; 2 Black. Comm. 404.

[4] Jackson *v.* Jackson, 7 Ves. 535; 9 Ves. 591; Hall *v.* Digby, 4 Bro. Parl. R. 224; s. c. 4 Bro. Parl. Cas. by Tomlins, 577; Collyer on Partn. B. 2, ch. 1, § 1, p. 80, 81, 2d edit.

[5] Ibid.

from a tenancy in common; for in a tenancy in common each party has a separate and distinct, although an undivided interest, and possesses (as it is technically expressed) the whole of an undivided moiety of the property, and not an undivided moiety of the whole property;[1] whereas in partnership the partners are joint owners of the whole property. A tenant in common can dispose only of his own share in the property; whereas (as we have seen), each partner may, in the partnership name, dispose of the entirety of the property for partnership purposes.

§ 91. The true nature, character, and extent of the rights and interests of partners in the partnership capital, stock, funds, and effects, is, therefore, to be ascertained by the doctrines of law applicable to that relation, and not by the mere analogies furnished by joint-tenancy, or by tenancy in common. It may, therefore, be said, that in cases of real partnerships, unless otherwise provided for by their contract, partners are joint owners and possessors of all the capital, stock, funds, and effects belonging to the partnership, as well those which are acquired during the partnership, as those which belong to it at the time of its first formation and establishment.[2] So, that, whether its stock, funds, or effects be the product of their labors or manufactures, or be received or acquired by sale, barter, or otherwise, in the course of their trade or business, there is an entire community of right and interest therein between them; each has a concurrent title in

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[1] 2 Black. Comm. 182, 191, 192, 193.

[2] 3 Kent, Comm. Lect. 43, p. 36, 37, 3d edit.; Collyer on Partn. B. 2, ch. 1, § 2, p. 76, 77, 2d edit.; Watson on Partn. ch. 2, p. 66, 2d edit.

the whole, or, as Bracton says: *Tenet totum in communi, et nihil separatim per se.*[1]

§ 92. Nor is there in reality, as between the partners themselves, any difference, whether the partnership property, held for the purposes of the trade or business, consists of personal or movable property, or of real or immovable property, or of both, so far as their ultimate rights and interests therein are concerned.[2] It is true, that at law, real or immovable property is deemed to belong to the persons, in whose name the title by conveyance stands. If it is in the name of a stranger, or of one partner only, he is deemed the sole owner at law;[3] if it is in the names of all the partners,

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[1] Ante, § 89; Bracton De Legibus, ch. 26, p. 430; Collyer on Partn. B. 2, ch. 1, § 2, p. 78, 2d edit.

[2] Watson on Partn. ch. 2, p. 72 to p. 77; Gow on Partn. ch. 2, § 1, p. 32 to p. 36, 3d edit.; Sage *v.* Sherman, 2 Comstock, R. 417. — There are some differences, however, arising from the very nature and character of the particular property. Each partner, as we shall presently see (and indeed, as has been already intimated), may sell or dispose of the entirety of any personal property of the partnership in the name of the firm. But if real estate has been conveyed to both partners for the partnership account, they ordinarily become tenants in common thereof at law, and each can convey by deed only his own share or moiety, and not that of the other. So, that while one partner may in the name of the firm sell the whole of any goods or articles belonging to the partnership, both must join in order to convey the entirety of the real estate thereof. Coles *v.* Coles, 15 Johns. R. 159, 161; Watson on Partn. ch. 2, p. 72, 73, 2d edit.; 2 Bell, Comm. B. 7, ch. 1, p. 613, 614, 615, 5th edit.; Collyer on Partn. B. 2, ch. 1, § 1, p. 82 to p. 101, 2d edit.

[3] Cox *v.* M'Burney, 2 Sandf. 561. — [In Equity he might be considered as holding in trust for the partnership, if the property is paid for from partnership funds. M'Guire *v.* Ramsay, 4 Eng. R. (Ark.) 518; Peck *v.* Fisher, 7 Cush. 386; Jarvis *v.* Brooks, 7 Foster, 37. The legal title however is undisturbed, except so far as to protect the equitable rights of the respective partners. Lang *v.* Waring, 25 Ala. 625. And see Black *v.* Black, 15 Geo. 445; Galbraith *v.* Gedge, 16 B. Monroe, 631.]

or of several strangers, they are deemed joint-tenants, or tenants in common,[1] according to the true interpretation of the terms of the conveyance.[2] But, however the title may stand at law, or in whosesoever name or names it may be, the real estate belonging to the partnership will in equity be treated, as belonging to the partnership, like its personal funds, and disposable and distributable accordingly; and the parties, in whose names it stands, as owners of the legal title, will be held to be trustees of the partnership, and accountable accordingly to the partners, according to their several shares and rights and interests in the partnership, as *cestuis que trust*, or beneficiaries of the same.[3] Hence in equity, in case of the death of

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[1] See Lancaster Bank *v.* Myley, 1 Harris, 544; Jones *v.* Neale, 2 P. & H. (Virg.), 339. [In Massachusetts it is settled that real estate conveyed to and held by partners as tenants in common, although purchased with partnership funds, and for partnership use, is to be considered *at law* as the several property of the individual partners, and liable to be levied on for their separate debts; but if so taken, it will be considered in equity as held by the creditor in trust, to be applied, so far as may be necessary, to the payment of partnership debts. Peck *v.* Fisher, 7 Cush. 386; see Burnside *v.* Merrick, 4 Met. 537; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582.]

[2] Anderson *v.* Tompkins, 1 Brock. Cir. R. 456, 465. See Blake *v.* Nutter, 1 Appleton, R. 16. [And parol evidence has been held inadmissible to show that real estate conveyed to two as tenants in common was purchased and paid for by them as partners, and was partnership property. Ridgway's Appeal, 3 Harris, 177.]

[3] 1 Story on Eq. Jurisp. § 674; Collyer on Partn. B. 2, ch. 1, § 1, p. 82, 83, 2d edit.; Hoxie *v.* Carr, 1 Sumner, R. 173; Gaines *v.* Catron, 1 Humph. R. 514; Smith *v.* Danvers, 5 Sandf. 669; Boyce *v.* Costar, 4 Strobh. Eq. 25; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Andrews *v.* Brown, 21 Ala. 437; Ludlow *v.* Cooper, 4 Ohio, St. R. 1; Roberts *v.* McCarty, 9 Ind. 17; Buchan *v.* Sumner, 2 Barb. ch. R. 165; Delmonico *v.* Guillaume, 2 Sandf. ch. R. 366; Rice *v.* Barnard, 20 Verm. 479; Morean *v.* Saffarans, 3 Sneed, 595.

one partner, there is no survivorship in the real estate of the partnership; but his share will go to his proper representatives.[1]

§ 93. Indeed, so far as the partners and their creditors are concerned, real estate belonging to the partnership, is in equity treated as mere personalty, and governed by the general doctrines of the latter.[2] [And a lease thereof by one partner in his own name will enure for the benefit of the firm.[3]] And so it will be deemed in equity, to all other intents and purposes, if the partners themselves have, by their agreement or otherwise, purposely impressed upon it the character of personalty. [But it seems the property should be purchased for partnership uses, as well as with partnership funds, in order to constitute it personalty.[4]] But a question has been made, whether, in the absence of any such agreement, or other act, affecting its general character, real estate, held as a part of the partnership funds, or stock, ought to devolve upon, or descend, as real estate, to the heir or devisee, or ought to belong as personalty to the executor or administrator, upon

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[1] Lake *v.* Craddock, 3 P. Will. 158; s. c. 1 Eq. Cas. Abridg. 291; Morris *v.* Barrett, 3 Younge & Jer. 384; Jackson *v.* Jackson, 9 Ves. 591; Collyer on Partn. B. 2, ch. 1, § 1, p. 82 to p. 102, 2d edit.; Watson on Partn. ch. 2, p. 72 to p. 77, 2d edit.; 1 Story Eq. Jurisp. § 674; 3 Kent, Comm. Lect. 43, p. 37, 38, 4th edit.

[2] Thornton *v.* Dixon, 3 Bro. ch. R. 199, and Mr. Belt's note (1); Balmain *v.* Shore, 9 Ves. 501, 507, 508, 509; Matlock *v.* Matlock, 3 Ind. 403; Ripley *v.* Waterworth, 7 Ves. 425; Rice *v.* Barnard, 20 Verm. 479; Cookson *v.* Cookson, 8 Sim. R. 529; Fereday *v.* Wightwick, 1 Russ. & Mylne, R. 45; Houghton *v.* Houghton, 11 Simons, R. 49; Buchan *v.* Sumner, 2 Barbour, Ch. R. 200; 1 Story, Eq. Jurisp. § 674.

[3] Moderwell *v.* Mullison, 21 Penn. St. R. 257.

[4] Galbraith *v.* Gedge, 16 B. Monroe, 631; Coder *v.* Huling, 27 Penn. St. R. 84. And see 10 Cush. 458. But see Ludlow *v.* Cooper, 3 Ohio, St. R. 9.

the death of the partner. Upon this point there has been a diversity of judicial opinion, as well as of judicial decision; some judges holding, that in such a case it retained its original character of real estate, and passed to the heirs or devisees accordingly; and others holding, that it was to be treated throughout, as partnership property, and therefore as personalty, and belonged to the executor or administrator. The doctrine under these circumstances must be considered, as open to many distressing doubts.[1]

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[1] Lord Thurlow held the former opinion in Thornton *v.* Dixon, 3 Bro. Ch. R. 199, and Belt's note (1); and Sir William Grant, in Bell *v.* Phyn, 7 Ves. 453, and Balmain *v.* Shore, 9 Ves. 501, adopted the same opinion. On the other hand, Lord Eldon, in Selkrigg *v.* Davies, 2 Dow, Parl. R. 231, 242, held the opposite opinion, that all property, involved in a partnership concern, ought to be considered as personal; and again affirmed it in Townshend *v.* Devaynes, reported in 1 Montagu on Partn. 97; 3 Bro. Ch. R. 199, Belt's note (1). Sir John Leach, in Fereday *v.* Wightwick, 1 Russ. & Mylne, R. 45, and Phillips *v.* Phillips, 1 Mylne & Keen, 649, and Broom *v.* Broom, 3 Mylne & Keen, 443, was of the same opinion as Lord Eldon. Mr. Baron Alderson, in Morris *v.* Kearsley, 2 Younge & Coll. 139, acted on the same opinion. More recently, the present Vice-Chancellor (Sir L. Shadwell) has upheld the doctrine of Sir Wm. Grant. Cookson *v.* Cookson, 8 Sim. R. 529. Mr. Collyer, in his valuable Treatise on Partnership, has discussed at large the whole learning applicable to this point. See Collyer on Partn. B. 2, ch. 1, § 1, p. 82 to p. 102. Mr. Bell has summed up the Scottish Law on these points as follows: "The property of the company is common; held *pro indiviso* by all the partners, as a stock, and in trust; responsible for the debts of the concern; and subject, after the debts are paid, to division among the partners according to their agreement. This is a great point in the doctrine of partnership, and important consequences are deducible from it. The common stock includes all lands, houses, ships, leases, commodities, money; whatever is contributed by the partners to the company use. It comprehends also whatever is created by the joint exertions of the company, or acquired in the course of the employment of their capital, skill, and industry. All this, by the operation of law, and the nature and effect of the contract, becomes common property; is held by all the partners jointly for the uses of the partnership; and is directly answerable as a stock for the payment of

§ 94. In virtue of this community of rights and interests in the partnership stock, funds, and effects, each

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its debts. (1.) VESTING OF THE STOCK. — The stock or common fund is held by the partners *pro indiviso*. And, — (1.) This *pro indiviso* right implies, as between the parties themselves, a right of retention in each partner over the stock, for any advances, which he may have made to the company, or for any debt due by the company, for which he may be made responsible. (2.) It also implies, in relation to the public at large, creditors of the company, a trust in the several partners, as joint trustees for payment, in the first place, of the company debts. And on this point rests (1.) the preference, which the creditors of the company have over the company funds; none of the partners, nor any one in their right, as individual creditors or otherwise, being entitled to more than the reversion after the purposes of the trust are fulfilled. And (2.) the peculiarity, that hereditable subjects belonging to and held by a company, are considered not as hereditable in succession, but as movable; consisting of the *jus crediti* only. (3.) In this respect, the contract of partnership has the effect of a direct conveyance of property to the company, of whatever is engaged to be given, or by clear evidence is contributed to the use of the company by any of the partners, to whom it belongs. The contract does not indeed supersede the necessity of the completion of the transference by tradition or otherwise; but it operates as a conveyance (*titulus transferendi dominii*), which, when followed by tradition, possession, intimation, and the other methods of completing a transference by law, vests the property in the partners, jointly for the purposes already expressed. 'Society,' says Lord Stair, 'is not so much a permutative as a commutative contract, whereby the contractors communicate to each other some stock, work, or profit. The effect of society is, that thereby something, which before was proper, becometh, or is continued to be, common to the copartners.' He adds: 'Yet this communication is not effectual to transfer the property in part, or to communicate it without delivery or possession, by which property by positive law is transferred.' This distinction is of some consequence. Where the question is between the parties and their representatives, as to what shall be considered as the estate of the company, but without involving any competition with third parties, whatever falls under the fair construction of the contract will, as a personal right, belong to the company and its creditors. But where there arises a competition depending on the question of real right, it will be determined according to that criterion of real right, which the law has appointed in cases of transference. But in determining, what shall amount to an engagement to contribute, and consequent conveyance of a particular subject, it is not always the use of the subject, that will settle the point. In one case, certain subjects, of which the use was given to the company, were

partner possesses full power and authority to sell, pledge, or otherwise to dispose of the entirety of any

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held to be fairly intended as part of the stock, from the way in which they were mentioned in the inventories. In another nearly similar case, the same inference was avoided, the partnership not being of a permanent character, but a momentary joint adventure merely. In respect to movables, all commodities comprehended within the partnership, and in possession of the partner, to whom they previously belonged, are held, as by *traditio brevis manus*, to be vested in the company; for the partners having power to hold for the company as *præpositi*, their possession will be presumed to be for the common behoof. But money due by a third party to an individual partner, or commodities in the hands of third parties, contributed by the owner as part of his stock, will not be transferred without delivery or intimation. The creditors of the owner, using attachment by diligence before intimation of the partnership, would attain a preference over the company. Ships must be transferred according to the directions of the statute. (4.) As to land and other property, which, by the forms of territorial conveyance, require to be transferred by deed, the partnership will acquire by the contract nothing more than the *jus ad rem*. If, for example, a cotton-mill is, by the agreement, contributed as his share of stock on the part of the owner, this will not feudally transfer to the company the property of the mill, so as to entitle them to exclude the adjudication of the separate creditors of the proprietor trusting to the record. But it will, like a general disposition, confer on the company a *jus ad rem*, by virtue of which they may, in a declarator and adjudication in implement, have that property declared and adjudged to the partners jointly, or to a trustee, as part of the stock of the concern. (5.) Such personal property as may have been acquired in the name of the society, becomes *eo ipso* the property of the partnership, although purchased by an individual partner with his own money. He is *præpositus* of the company, and entitled to advance money and acquire property directly for the common behoof. (6.) Such personal property as a partner acquires, even in his own name, provided it be beneficial acquisition and in the company's line of trade, is according to the spirit of the contract of partnership, to be held as acquired for the company; and the company will be entitled to claim it. But it would rather seem, that in such a case the property would pass to the partner in real right, with a *jus ad rem* to the company and its creditors. (7.) A partner, who binds himself to pay a sum or fungible into the stock, is debtor to the company; and the loss of the money or fungible, before being put into stock, is his private loss. If he has engaged to put in a specific subject into stock, and it perish, the loss is to the company, unless the partners shall be *in mora*." 2 Bell, Comm. B. 7, ch. 1, p. 613 to p.

particular goods, wares, merchandise, or other personal effects belonging to the partnership, and not merely of

615, 5th edit. Mr. Chancellor Kent, in his learned Commentaries (Vol. 3, p. 37 to p. 40, 4th edit.), has discussed the subject at large; and after referring to the American authorities, which are as much in conflict with each other as the English, he expresses his own opinion to be, that the weight of authority is, that equity will consider the person, in whom the real estate is vested, as trustee for the whole concern, and the property will be entitled to be distributed as personal estate. 3 Kent, Comm. Lect. 43, p. 37, 38, 39, 4th edit.; and the authorities cited in the notes, ibid. See Gow on Partn. ch. 2, p. 32 to p. 35, 3d edit.; Watson on Partn. ch. 2, p. 81 to p. 89, 2d edit.; Gow on Partn. Supplement, 1841, to 3d edit. ch. 2, § 1, p. 8 to p. 13. [See also Buchan *v.* Sumner, 2 Barbour, Ch. R. 165, where all the cases are ably reviewed. In the course of his judgment Chancellor Walworth remarks as follows: "The American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, are various and conflicting. But I think they may generally be considered as establishing these two principles: *First*, that such real estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon the winding up of the affairs of the firm. *Secondly*, that, as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate." See also Buckley *v.* Buckley, 11 Barbour, 43; Patterson *v.* Brewster, 4 Edw. Ch. 352. In the former case, Hand, J., observed: "The authorities in England upon this point are very conflicting. An elaborate examination of them will be found in the recent edition of Collyer on Partnership by Mr. Perkins. That writer and Mr. Bisset, in his late work on the same subject, found it difficult to reconcile the decisions. Mr. Cary hardly pretends to give an opinion; though he says 'opinions, however, preponderate in favor of its being treated as personal estate.' (Cary on Partnership, 27.) In Lake *v.* Craddock (3 P. Wms. 158), before Ld. Ch. King, in 1732, five persons purchased land for £5,000, and went on for several years trying to drain it, then Craddock abandoned the concern. The other four continued the work and also purchased other lands. After Craddock died one of the four filed a bill for account and division. The master of the rolls decided that the parties were tenants in common, and against survivorship. He also decided that the defendant, who was son and heir, and executor of Craddock deceased, should pay enough with interest, to make his father's share equal to the others in all the lands, and have an equal share, or in

his own share thereof, for purposes within the scope of the partnership.[1] In respect to his own share thereof,

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default of such payment, have nothing. The defendant appealed, and the decree was affirmed. In Thornton *v.* Dixon (3 Bro. C. C. 199), three persons owned land in fee and entered into copartnership as paper-makers, and built upon the land. Three years after, they took four others into the firm for twenty-one years, and by the deed of copartnership, the three first were to stand seized of the land in trust for the uses of the copartnership, in proportion to their several interests, and in case of a desire by one to sell, the others were first to have notice, so that they might buy. The time limited for the partnership expired, and they still continued business until one died. During the second copartnership they had purchased other lands for the better carrying on of their business. All the lands were used for the purposes of their trade. Thurlow, Ld. Ch., considered the land as realty; but said if there had been an agreement to value and sell, it would have been considered as personalty of the partnership. Bell *v.* Phyn (7 Ves. 453), was decided in 1802, by Sir Wm. Grant. Three persons, merchants and partners, with another, purchased a plantation in New Grenada, and before the death of one of them, had nearly paid for it out of partnership funds. All the accounts in relation to it were kept in the partnership books. One of the residuary legatees of a deceased partner, filed a bill, and it was held that the plantation was real estate. The master of the rolls said there was no occasion to call for it for any of the purposes of the partnership. Ripley *v.* Waterworth, decided the same year by Ld. Eldon (7 Ves. 425), and Smith *v.* Smith, by Ld. Loughborough (5 Ves. 189), turned upon contract; the deeds evincing an intention of the parties to have the property converted into personal estate. Balmain *v.* Shore, decided in 1804 by Sir Wm. Grant (9 Ves. 500), also turned upon the articles of copartnership, and the recitals in the conveyances. It was held, that the firm had a right to

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[1] Watson on Partn. ch. 2, p. 91 to 93, 2d edit.; Gow on Partn. ch. 2, § 2, p. 51 to 54, 3d edit.; Collyer on Partn. B. 3, ch. 1, § 1, p. 263 to 268, 2d edit.; Id. B. 2, ch. 1, § 2, p. 113; Fox *v.* Hanbury, Cowp. R. 445; 3 Kent, Comm. Lect. 43, p. 44, 4th edit.; Woodward *v.* Cowing, 41 Maine, R. 13.—Of course we are to except from this doctrine all cases, where, although the property originally belonged to the partnership, it has become the property of an individual partner by the consent of the firm; for in such cases, the property is to all intents and purposes to be treated as the private property of that partner, and is disposable by him alone accordingly in the same manner, as if it never had belonged to the partnership. Collyer on Partn. B. 2, ch. 1, § 2, p. 113, 114, 2d edit.

he may be properly deemed to do all acts of this sort, as owner; in respect to the shares of his copartners, he

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the use of the property during its existence, and that, subject to this use the property was real estate. The property was purchased after the formation of the copartnership, and was a china and pot manufactory, the firm carrying on the business of potters. This case is hardly in consonance in all respects with Ripley *v.* Waterworth. In Randall *v.* Randall, (7 Sim. 271), decided in 1835, the Vice Chancellor, Sir Lancelot Shadwell, reviewed many of the authorities. Two brothers, one a land surveyor, and the other a grocer, became copartners in the business of farming. Soon after, they became partners, also, in the business of making malt; and again soon after that, in the manufacture of biscuit. The malting business continued about thirteen, and the biscuit making about twenty years. The farming business continued in all nearly thirty-five years, until the death of one of the brothers. When they began, they were tenants in common with others of property partly freehold and partly leasehold, consisting of a house, barn, lands, &c., their father's estate. There the farming and malting business were carried on, and the baking business there and on the separate land of one of them. They began in 1792, and in 1802, bought out one of their co-tenants with partnership funds. In 1803, they purchased and paid for another parcel in the same way, and in 1805, another; all of which were used for their farming and agricultural purposes. In 1808, certain allotments of lands were made to them, which they improved with partnership funds, and they were used as the other property. In 1820, they purchased some other lots with partnership funds, which they let to tenants. It was held that these parcels were not personal estate. Cookson *v.* Cookson, was decided by the same judge in 1837 (8 Sim. 529). In that case Cookson the father, who was a bottle manufacturer, was seized of certain estates in fee. He formed a partnership with Cookson the younger for twenty-four years, and conveyed to him in fee nearly one fifth of this real estate. After the partnership had continued about fifteen years, the father conveyed another portion to the son, which made him owner in fee of nearly an equal undivided one third of the whole. The consideration of these conveyances, as expressed, was love and affection. The conveyances also included an equal share of the trade, stock, capital, and business of the firm. It was agreed that the hereditaments should be used as a manufactory for carrying on the trade, and should be considered as part of the joint-stock of the business. And it was to be had, taken, and enjoyed as part of the joint-stock in the partnership business. And they did, for themselves and their respective heirs, &c., covenant with each other and their several heirs and executors, &c., "that the freehold hereditaments should at all times thereafter be held and occupied as partnership property, and be

may be properly deemed to do such acts, as their agent, and as the accredited representative of the firm. The

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considered and treated as part of the joint-stock of the partnership trade, according to the several shares and interests of the parties therein." And if either partner should wish to sell, or if he should die without having bequeathed or assigned to a son or sons, then twenty days' notice should be given to the survivor, of such devise or death, who might purchase the interest of the other at such valuation as they had put to the shares at their last annual account, &c. If not purchased, it might be sold to others who should be admitted partners. After the partnership had existed twenty-four years, they continued on about four years longer, as before, without new articles, and until the death of the father. During the whole twenty-eight years, they held and used this freehold property for the purposes of their trade alone; and its estimated value was entered in the books and accounts of the firm as part of the joint-stock or capital, and was considered and treated, in all respects, as part of it. Over $8,000 were expended out of the funds of the partnership, in erecting new buildings, and making other improvements upon the premises. The bill was filed to have the interest of the elder Cookson in the freehold, declared stock in trade of the partnership, and that the eldest son had no interest as heir, and that the surviving partner had no right of preëmption, and that the estate be sold, &c. In the course of the argument, the Vice-Chancellor asked if there was any case where real estate had been declared personal, where the land was not purchased with partnership funds, nor was required to be sold for partnership purposes? In delivering his opinion, he considered the clause in relation to preëmption, as not continuing after the first twenty-four years. He laid stress on the fact that it was not suggested, that when the partnership terminated, there was 'any necessity for a sale of a particle of the assets for the purpose of paying the partnership debts.' Nor was the property purchased with partnership funds. He approved of the reasoning of Sir Wm. Grant in Bell *v.* Phyn (supra), and decided there was no conversion. If these cases declare the law, there has been no conversion in this case. But there are contrary decisions. Ripley *v.* Waterworth, we have noticed. It was decided in 1802 by Lord Eldon; and turned upon the construction of the deed of partnership, which, it was held, was a conversion of the real estate out and out. Leigh & Dalzell put the case as one of contract of sale. (Leigh & Dal. on Eq. Conv. 21.) This case is said by Mr. Collyer, to have paved the way for the modern doctrine and the leading case of Lord Eldon favorable to equitable conversion in cases of partnership. (Coll. on Partn. 72, Perk. ed. § 142.) But he says it was placed upon express agreement, and I think Lord Eldon expressly put it upon that ground. There was a right of preëmption, and one of the partners elected to purchase, and did so. So the agreement to purchase was executed. The prop-

law, however, treats each partner, without any nicety of discrimination of this sort, as possessing a dominion

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erty was both freehold and leasehold; and was conveyed to trustees to the use of such persons as the partners should respectively appoint, and, in default of appointment, to the use of the partner and to sell and pay partnership debts, and divide or convey, &c. The same chancellor is said to have gone further in Townsend *v.* Devaynes (1 Mont. on Part. App. 96). As reported in that work, he decided that real estate consisting in part of paper-mills, purchased by paper-makers, who were partners, and paid for out of partnership capital, and held for the uses of the partnership, was, on the death of one of the firm, and as between heir and executor, to be considered personal estate. But Mr. Jacob seems to think there was an agreement between the partners for a conversion of the property. (See 1 Roper on Hus. and Wife, 346; n. Jac. ed. and the opinion of the Vice-Chan. in Randall *v.* Randall, supra.) Mr. Bickersteth, in his argument in the case of Philips *v.* Philips, says, nothing existed of this case except a brief statement extracted from the pleadings; that there was no judgment in the case, and it was doubtful whether there was not an agreement, and that Lord Eldon six years after, in Crawshay *v.* Maule (1 Swanst. 521), treated the point as unsettled. This last remark, it seems, is warranted by the report of Crawshay *v.* Maule. Fereday *v.* Wightwick came on before Sir J. Leach, M. R., in 1829. (1 Russ. & My. 45; s. c. 1 Taunt. 250.) Six persons took a lease for years of certain mines, for the purpose of working them in partnership. One, who had been manager, assigned his shares by way of security for money advanced, and then became bankrupt, greatly indebted to the concern. The bill was filed by the other persons interested therein; prayer for sale of partnership property, and to have accounts taken and copartnership dissolved, and that the shares of the bankrupt be applied in payment of the debt to the partnership he had incurred in managing its affairs. The court so held. The master of the rolls is reported by Tamlyn to have said: 'It is a principle that all property, whether real or personal, is subject to a sale, on a dissolution of the partnership. This is property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership.' By Russell & Mylne, that 'the general principle is, that all property acquired for the purposes of trading concerns, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership.' The same judge in Philips *v.* Philips (1 My. & K. 649, 1832), went a step further and said, with respect to the question, 'whether the freehold and copyhold property purchased with partnership capital, and conveyed to the two partners and their heirs for the purposes of

over the entirety of the property, and not merely over his own share, and, therefore, as clothed with all the or-

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partnership trade, is to be considered as personal estate only for the payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of the deceased partner, I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate; and in the case of Fereday *v.* Wightwick, I had no intention to confine the principle to the payment of partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion; the case of Townsend *v.* Devaynes, is a clear decision to that effect; and general convenience requires that this principle should be adhered to.' The case was this: John Philips devised his freehold and copyhold estates to his executors for sale and to turn into money, and provided for the distribution of the proceeds. The testator was a brewer, and carried on that business in partnership with his relation, John Philips, but there were no articles of copartnership between them. In the course of their business, and after the date of the will, they purchased freehold and copyhold public houses for the purposes of their trade, with partnership moneys. Their uncle had also devised to them other copyhold estates, which they also used in their business. He also devised to them mortgages of other public houses, and the nephews out of the partnership funds purchased the equity of redemption. The history of the case seems not complete in Mylne & Keene, but additional facts have been given by Mr. Bisset in his work on partnership. (Bisset on Partn. 50. And see Perkins' Coll. on Partn. § 145, and n.) As reported by Mylne & Keene, one question was: whether the interest of the testator in the public houses purchased after the date of the will, by the copartners, was to be considered a part of his general personal estate, or only personal estate so far as required to discharge the debts and engagements of the trade. The bill was filed by the coheiresses at law against the executrix and surviving residuary legatees, and the decision was against the plaintiffs. It appears from the corrections of this case by Mr. Bisset, that the public houses devised by the uncle, and the land upon which were the mortgages devised to them by the uncle, and of which they afterwards purchased the equity of redemption with partnership funds, were declared not to be part of the capital and effects of the partnership. (Bisset on Partn. 50, n. Perk. Coll. on Partn. 145, n.) The court then distinguished between the lands purchased with partnership funds and those not purchased with partnership funds, or only in part. For the equity of redemption was paid for out of the partnership funds, and all was used for partnership purposes. Broom *v.* Broom

dinary attributes of ownership.[1] This doctrine, indeed, seems indispensable to the security and convenience of

(3 Myl. & Keen, 443), was decided by the same judge, ten years after Philips v. Philips. On the strength of the latter case, as between the heir and administratrix, it was held that real estate, purchased by partners with partnership funds, for partnership uses, was, in equity, personalty. The same judge who decided Randall v. Randall and Cookson v. Cookson, decided Houghton v. Houghton (11 Sim. 491). Two partners purchased land for the purposes of their trade, and borrowed money to do it, for which they gave a mortgage upon the land. They erected trade buildings on it and paid for them, for insurance, and the interest on the mortgage, with partnership funds; and one died. The survivor took another partner and they did the same, and finally paid the mortgage out of the partnership property, and took a reconveyance of the land to themselves, and the survivor of the first firm died. Held, against the heir of both of the first partners, that the land was personalty. There are other cases bearing upon this question. (Smith v. Smith, 5 Ves. 189., Bolmain v. Shore, 9 Id. 500. Rowley v. Adams, 1 Beav. 548. Custance v. Bradshaw, 4 Hare, 315.) But I have referred to enough to show it may well be considered *quæstio vexata* in England. Supposing the law laid down by Lord Thurlow and Sir Wm. Grant to be overruled by the decisions of Lord Eldon and Sir John Leach, still it seems that, where there is no express agreement, there is but one case in which the real estate is converted, out and out, into personal; that is, where it is purchased with partnership funds, for partnership purposes. (Perkins's Coll. § 154.) As between individual and partnership creditors, perhaps it might be different had property in severalty been greatly improved with the partnership funds. The decisions in this country are as unsatisfactory

[1] 3 Kent, Comm. Lect. 43, p. 41, 4th edit. — Mr. Chancellor Kent here says: "With respect to the power of each partner over the partnership property, it is settled that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. This power results from the nature of the business, and is indispensable to the safety of the public, and the successful operations of the partnership. A like power in each partner exists in respect to purchases on joint account; and it is no matter with what fraudulent views the goods were purchased, or to what purposes they are applied by the purchasing partner, if the seller be clear of the imputation of collusion. A sale to one partner, in a case within the scope and course of the partnership business, is, in judgment of law, a sale to the partnership."

the public, as well as to the facility of transacting commercial business. But in respect to real estate a differ-

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as in England. Most of them are collected by Mr. Perkins in his edition of Collyer's work on partnerships. In this State, the question has arisen but a few times. Coles *v.* Coles was a case at law, and was decided in 1818. (15 Johns. 159.) There is no doubt but the property descends to the heir, who is tenant in common with the survivors. (Broom *v.* Broom, supra. Perkins's Colly. § 133. Howard *v.* Priest, 5 Metc. 582. Buchan *v.* Sumner, 2 Barb. S. C. Rep. 165.) But the *dicta* of the court went further, in Coles *v.* Coles, than to put the case on mere legal grounds. It was an action of assumpsit by the administratrix of a deceased partner, against the survivor, for a moiety of the avails of real estate conveyed by the partners, and which they had used in their partnership trade. It was contended that it was a partnership transaction, and required the investigation of partnership accounts. But the plaintiff recovered. The court say 'the principles and rules of law, applicable to partnerships, and which govern and regulate the disposition of partnership property, do not apply to real estate.' And it is added that 'there may be special covenants and agreements entered into between partners relative to the use and enjoyment of real estate owned by them jointly, and the land would be considered as held subject to such covenants, but nothing of that kind appears in the present case; and in the absence of such special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership;' and they rely upon Thompson *v.* Dixon and Bolmain *v.* Shore, both cases in chancery. M'Coun, V. C., in Smith *v.* Jackson, decided in 1833 (2 Ed. Rep. 28), reviewed many of the authorities. Lands, which had been purchased by partners with partnership funds, and part of which was on speculation, were sold on mortgages given by the partner who had become insolvent, and the struggle was for the surplus money. The court held that it was liable to be applied to partnership purposes, and that the creditors of the firm were entitled to it; subject to an equitable right of dower in favor of the widow of a deceased partner, who had joined her husband in the mortgage. The vice-chancellor treated the property as real estate, except that it was liable for the debts of the firm. He notices the English cases of Thornton *v.* Dixon, Bell *v.* Phyn, Bolmain *v.* Shore, and Smith *v.* Smith, and says it depends upon the agreement of the parties whether the property is to be considered, in equity, real, or converted into personal estate. In Delmonico *v.* Guillaume (2 Sandf. Ch. R. 366, in 1845), Assistant Vice-Chancellor Sandford held that real estate, purchased with partnership funds and for partnership purposes, and so used, was liable for the debts of the firm. He declined giving any opinion how it would be between the real and personal representatives. Chancellor Walworth examined the subject very fully in Buchan *v.* Sumner (2 Barb. Ch. Rep. 198 to 207).

ent rule prevails, founded upon the nature of the property and the provisions of the common law applicable

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The rule, as found in Thornton *v.* Dixon, Bell *v.* Phyn, and Bolmain *v.* Shore, he thought overruled by Lord Eldon in Townsend *v.* Devaynes; and that, unless otherwise expressed in the partnership articles, in England, real estate is considered in equity as personal property, and goes to the personal representatives; and cited Selkirk *v.* Davis (2 Dow's P. C. 231), and Philips *v.* Philips, Broom *v.* Broom, Houghton *v.* Houghton, and Morris *v.* Kearsley (2 Young & Coll. 139), before Mr. Baron Alderson. He however mentioned the later cases of Rowley *v.* Adams, Randall *v.* Randall, and Baxter *v.* Newman (1 Lutw. Reg. Cas. 287), as departures from this rule. But he considers the American decisions as establishing these two principles; that where real estate is purchased with partnership funds, or for the use of the firm, in equity it is chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another upon winding up the affairs of the firm. But that, as between the personal representatives and the heir at law of a deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate. These cases leave no doubt as to the law in this State; and this is reasonable. It is clear that all depends upon the intention of the parties. And in the absence of any expressed intention to that effect, how can it be presumed that a man intends to convert real estate into personal, and break the descent, merely because a portion of the partnership funds are appropriated for the purchase of real estate? If a member receives a portion of those funds as his dividend, and so appropriates it, clearly no such presumption arises. It is due to the creditors and the members of the firm that the property should not be withdrawn until the partnership affairs are adjusted. But as between heir and executor, the reason of the rule fails. Nor is it clear that the law of England differs so much from that of this State. All the earlier cases, at least, claim to put the conversion upon the intention manifested by the contract or will. And Lord Eldon, to whom the paternity of the new rule is ascribed, so decided in Ripley *v.* Waterworth. The grounds upon which he decided Townsend *v.* Devaynes, are at least doubtful; and in Stewart *v.* Marquis of Bute (11 Ves. 665, 1804, 6; s. c. 3 Id. 212), he said: 'In cases where persons engaged in partnership have bought freehold estates, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract, or the will, been held sufficient against the heir.' The case was one on the construction of a will, but related to a colliery carried on by tenants in common in partnership. True in Salking *v.* Davies (2 Doug. 242), he thought all property involved in a partnership

thereto. Each partner is required, both at law and in equity, to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee; and if one partner only executes it, whether it be in his own name, or in that of the firm, the deed will not ordinarily convey any more than his own share or interest therein.[1]

§ 95. The Roman law does not seem, ordinarily, to have conferred upon partners the same extensive powers and mutual rights over the disposition of the partnership property, as is given by the common law, unless indeed a particular partner was specially clothed with the authority of all the partners, as the general agent of the partnership in the administration of its affairs. Hence, one partner could not ordinarily, in virtue of that relation alone, contract debts, which would be binding on all the partners, or alienate more than his share of the partnership property. Accordingly it is laid down in the Digest: *Nemo ex sociis plus parte suâ potest alienare, etsi totorum bonorum socii sint.*[2] And again: *In re communi neminem dominorum jure facere quicquam, invito altero, posse; unde manifestum est prohibendi jus esse.*[3] Those, who were specially appointed to

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concern, ought to be personal; but he appeared to have doubts in the later case of Crawshay *v.* Maule (1 Swanst. 508). The change in the law, if any, is therefore more attributable to Sir John Leach; and recent cases seem returning to the former rule, which we have adopted. This is, that real estate owned by partners, remains so, unless an equitable adjustment of the concern requires its conversion, or the owner has expressed his intention that it be converted into personalty. (See Dyer *v.* Clark, 5 Metcalf, 577.)"]

[1] Coles *v.* Coles, 15 Johns. R. 159, 161; Jackson *v.* Stanford, 19 Geo. 14; Ante, § 93, note (1).

[2] Dig. Lib. 17, tit. 2, l. 68; Pothier, Pand. Lib. 17, tit. 2, n. 26, 27; Pothier, de Societé, n. 89; 1 Domat, B. 1, tit. 8, § 4, art. 16.

[3] Dig. Lib. 10, tit. 3, l. 28; Pothier, Pand. Lib. 17, tit. 2, n. 27.

administer the affairs of the partnership, were called *Magistri Societatis — Ita Magistri appellantur.*[1] Similar principles prevail in our day in the foreign law of many countries, whose jurisprudence is founded on the Roman law; and especially in that of France.[2] However, by the modern code of France, the partners are deemed to have given reciprocally to each other the power of administering one for the other, in default of any special stipulations, as to the mode of administration.[3] This, of course, leaves the rights of the partners to be governed by the general law of France, where such stipulations exist, although they may be unknown to third persons, and, of course, it may expose the latter to some hazards of loss or inconvenience, if they trust to their confidence in a single partner, not notoriously authorized to administer for the partnership.

§ 96. The Scottish law has avoided this difficulty, and followed the general doctrine of the common law. By the Scottish law, it is implied from the very nature of partnership, that each partner is clothed with the complete power of administering the property and affairs of the partnership, as *prepositus negotiis societatis*, to the effect not only of holding possession of the property for the company, and of acquiring property for them in the course of their trade and business, but also to the effect of entering into contracts on behalf of the company, and binding the company by all acts in the ordinary administration of such trade and business.[4]

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[1] Dig. Lib. 2, tit. 14, l. 14; Id. Lib. 50, tit. 16, l. 57; 1 Domat, B. 1, tit. 8, § 4, art. 16; 2 Bell, Comm. B. 7, p. 615, 5th edit.

[2] Pothier, de Societé, n. 66 to 72.

[3] Code Civil of France, art. 1856, 1860.

[4] 2 Bell, Comm. B. 7, p. 615, 5th edit.

And it will make no difference in this respect, that there are private stipulations between the partners themselves prohibiting or restraining this right or authority; for, as a general institorial power, it will still be deemed to exist in favor of third persons, who are ignorant of any such prohibitions or restrictions.[1]

§ 97. Besides this community of interest in the capital stock, funds, and effects of the partnership, each partner has certain rights, liens, and privileges thereon. In the first place, no one partner has any right to share in the partnership property, except what remains thereof after the full discharge and payment of all debts and liabilities of the partnership; and, therefore, each partner has a right to have the same applied to the due discharge and payment of all such debts and liabilities, before any one of the partners, or his personal representatives, or his individual creditors, can claim any right or title thereto.[2] In short, as between the partners themselves, the debts and liabilities of the firm to creditors and third persons are a fund appropriated, in the first instance, to the discharge and payment of such debts and liabilities, and there is, properly speaking, as between them, a lien thereon, or at least an equity, which may be worked out through the partners in favor of the creditors, although it may not directly attach in the creditors by virtue of their original claims, in all cases.[3] Each

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[1] 2 Bell, Comm. B. 7, p. 615, 5th edit.

[2] Collyer on Partn. B. 2, ch. 1, § 1, p. 77, 2d edit.; West v. Skip, 2 Ves. 142; Ex parte Ruffin, 6 Ves. R. 119.

[3] Ex parte Ruffin, 6 Ves. R. 119, 126.—In this case Lord Eldon said: "It is the case of two partners, who owed several joint debts, and had joint effects. Under these circumstances their creditors, who had a de-

partner also has a specific lien on the present and future property of the partnership, not only for the debts and

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mand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint; his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true, that the separate creditors of each, by bringing actions, might acquire a certain interest even in the partnership effects; taking them in execution in the way, in which separate creditors can effect such property. But there was no lien in either. The partnership might dissolve in various ways; first, by death; secondly, by the act of the parties; that act extending to nothing more than mere dissolution; without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the others. The partnership might also be dissolved by the bankruptcy of one or of both, and by effluxion of time. If it is dissolved by death, referring to the law of merchants, and the well-known doctrine of this Court, the death being the act of God, the legal title in some respects, in all the equitable title, would remain, notwithstanding the survivorship; and the executor would have a right to insist, that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right; supposing both remained solvent. So upon the bankruptcy of one of them there would be an equity to say, the assignees stand in the place of the bankrupt; and can take no more than he could; and consequently nothing until the partnership debts are paid. So, upon a mere dissolution, without a special agreement, or a dissolution by effluxion of time; to wind up the accounts the debts must be paid, and the surplus be distributed in proportion to the different interests. In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves. When the bankruptcy of both takes place, it puts an end to the partnership certainly; but still it is very possible, and it oftens happens in fact, that the partners may have different interests in the surplus; and out of that a necessity arises, that the partnership debts must be paid: otherwise the surplus cannot be distributed according to equity; and no distinction has been made with reference to their interests, whether in different proportions, or equally. Many cases have occurred upon the distribution between the separate and joint estates; and the principle in all of them, from the great case of Mr. For-

liabilities due to third persons, but also for his own amount or share of the capital, stock, and funds, and for all moneys, advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any other partner from such stock and funds beyond his share.[1] It follows from this principle, that if any partner takes the whole or a part of his share out of the partnership stock, the stock so taken, if identified, is applicable to the payment of what shall, upon an account taken, be found due from him to the partnership, before any of it can be applied to the payment of his debts, due to his own separate creditors; for such partner has an interest in the stock only to the amount of the ultimate balance due to him, as his share of the stock.[2] The same rule will apply to any other property, into which the partnership property may have been converted, so far and so long as its original character and identity can be distinctly traced.[3] Hence it may be stated, as a general corollary from the foregoing considerations, that no separate creditor of any partner can acquire any right, title, or interest, in

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dyce, has been, that if the Court should say, that what has ever been joint or separate property shall always remain so, the consequence would be, that no partnership could ever arrange their affairs. Therefore a *bonâ fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors; and therefore the Court always lets the arrangement be, as they stand, not at the time of the commission, but of the act of bankruptcy." S. P. Ex parte Williams, 11 Ves. 3, 5; Kirby *v.* Schoonmaker, 3 Barbour, Ch. R. 46.

[1] Collyer on Partn. B. 2, ch. 1, § 1, p. 77, 2d edit.; West *v.* Skip, 1 Ves. R. 139, 142; Ex parte Ruffin, 6 Ves. R. 119.

[2] Collyer on Partn. B. 2, ch. 1, § 1, p. 78, 79, 2d edit.; West *v.* Skip, 1 Ves. R. 139, 240, 242; Skip *v.* Harwood, 2 Swanst. R. 586; Croft *v.* Pyke, 3 P. Will. R. 180; Watson on Partn. ch. 2, p. 66, 2d edit.

[3] Collyer on Partn. B. 2, ch. 1, § 1, p. 78, 79, 2d edit.; Ridgley *v.* Carey, 4 Harr. & McH. 167.

the partnership stock, funds, or effects, by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied.

§ 98. What properly constitutes partnership property may be, in some particular cases, an inquiry of no inconsiderable embarrassment and difficulty, although, when all the facts are established, the principles of law applicable to it are generally clearly defined. So far as personal property is concerned, not only the capital, stock, funds, and other effects originally put into the partnership, but all the property subsequently acquired by the firm, by sale, barter, or otherwise, and all the debts and other claims arising in the course of the trade and business thereof, are deemed part of the partnership capital, stock, funds, and effects.[1] So, all real estate, purchased for the partnership, and paid for out of the funds thereof, in whosesoever name it stands,[2] is treated in the same manner.[3] Leases of land, also, originally granted to or for the partnership, or subsequently renewed during the partnership, for the purposes thereof, fall under the like predicament.[4] In short, whatever property, whether real or personal, or mixed, is purchased for the use and purposes of the partnership, and is chargeable to the same, is in the contemplation of

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[1] Collyer on Partn. B. 2, ch. 1, § 1, p. 76, 77, 78, 2d edit.

[2] But see Otis *v.* Sill, 8 Barbour, 122, as to such a rule *at law*, if the title is in only one partner.

[3] Collyer on Partn. B. 2, ch. 1, § 1, p. 82, 83, 2d edit.; Jackson *v.* Jackson, 7 Ves. R. 535; 9 Ves. R. 591.

[4] Collyer on Partn. B. 2, ch. 1, § 1, p. 83, 84, 101, 2d edit.; Elliott *v.* Brown, 9 Ves. R. 597; 3 Swanst. R. 490, note; Alder *v.* Forracre, 3 Swanst. R. 489; Featherstonehaugh *v.* Fenwick, 17 Ves. R. 398; Gow on Partn. ch. 2, § 1, p. 32 to 34, 3d edit.; Coles *v.* Coles, 15 Johns. R. 159, 161.

courts of equity, even if not of courts of law, treated as a part of the effects thereof.[1]

§ 99. There is a peculiar species of interest, which arises in cases of partnership, and is often treated as in some sort a part of the partnership property. It is what is commonly called the good-will of the trade or business. This good-will may be properly enough described to be the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities or even from ancient partialities, or prejudices.[2] Thus, an inn, a nursery of trees and shrubs, a favorite fashionable stand, or a newspaper establishment, may, and often does enjoy a reputation, and command a price beyond the intrinsic value of the property invested therein, from the custom, which it has obtained and secured for a long time; and this is commonly called the good-will of the establishment.[3] Lord Eldon upon one occasion said, that a good-will of this sort was nothing more than the probability, that the old customers will resort to the old place.[4] It is certainly not a visible, tangible interest, or a commodity, upon which a

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1 Story on Eq. Jurisp. § 674.

2 Cruttwell *v.* Lye, 17 Ves. R. 336; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68, 69, 70. See also an able review of the doctrine in 16 Am. Jurist, p. 87 to 92.

3 See Cruttwell *v.* Lye, 17 Ves. R. 336; Coglake *v.* Till, 1 Russ. R. 376; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68, 69.

4 Cruttwell *v.* Lye, 17 Ves. R. 336, 346.

definite or fixed allowance can be made;[1] nor, perhaps, would a contract, touching the conveyance thereof, be decreed to be specifically performed in equity.[2] It is not, therefore, strictly speaking, a part of the partnership effects, of which, upon a dissolution thereof, a division can be compelled, unless, indeed, in cases, where a sale of the whole premises and stock will be ordered; and then the good-will will accompany such sale, and may create a speculative value in the mind of a purchaser, of which each partner will be entitled to his share of the benefit.[3] But the term "good-will" is sometimes applied to another case, where a retiring partner contracts not to carry on the same trade or business at all, or not within a given distance. This is an interest, which may be valued between the parties, and may therefore be assigned with the premises and the rest of the effects to the remaining partner, as an accompaniment of the ordinary good-will of the establishment.[4] Good-will, in the former sense, is therefore

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[1] Collyer on Partn. B. 2, ch. 1, § 1, p. 102, 103, 2d edit.

[2] Baxter *v.* Conolly, 1 Jac. & Walk. 556; Coslake *v.* Till, 1 Russ. R. 376, 378; Shakle *v.* Baker, 14 Ves. R. 468.

[3] Collyer on Partn. B. 2, ch. 1, § 1, p. 102, 103, 2d edit.; Id. ch. 3, § 4, p. 214 to 218; Crawshay *v.* Collins, 15 Ves. R. 218, 227; Cruttwell *v.* Lye, 1 Rose, R. 123; Featherstonehaugh *v.* Fenwick, 17 Ves. R. 298, 309, 310; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68, 69, 70; Gow on Partn. ch. 5, § 4, p. 349, 350, 3d edit. — Lord Rosslyn, in Hammond *v.* Douglas (5 Ves. 539), held, that the good-will of a trade, carried on without articles, survives, and is not to be considered as partnership stock, to which the representatives of a deceased partner have any right. But Lord Eldon, in Crawshay *v.* Collins (15 Ves. 227), expressed doubts of the propriety of that determination, considering it difficult to draw any solid distinction between the lease of the partnership premises, and the good-will, which consists in the habit of the trade being conducted on those premises. Gow on Partn. ch. 5, § 4, p. 349, 3d edit.; Collyer on Partn. B. 2, ch. 1, § 1, p. 102, 103, 2d edit.

[4] Collyer on Partn. B. 2, ch. 1, § 1, p. 102, 103, 2d edit.; Id. ch. 3, § 4, p.

an advantage arising from the mere fact of sole ownership of the premises, stock, or establishment, without reference to other persons, as rivals; and in the latter sense, as an advantage arising from the fact of excluding the retiring partner from the same trade or busi-

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214 to 218, and note; Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Harrison *v.* Gardner, 2 Madd. R. 198; Cruttwell *v.* Lye, 17 Ves. R. 336; Gow on Partn. ch. 5, § 4, p. 349, 3d edit.—Lord Eldon, in Kennedy *v.* Lee (3 Meriv. R. 441, 452), speaking on this subject, used the following language: "Where two persons are jointly interested in trade, and one by purchase becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, and which may be pointed out as a distinct benefit, essentially connected with the sole ownership. In the case of the trade of a nursery-man, for instance, the mere knowledge of the fact, that he is sole owner of the property, and in the sole and exclusive management of the concern, gives him an advantage, which the other partner, supposing him to carry on the same trade, with other property, not the partnership property, would not possess. In that sense, therefore, the good-will of a trade follows from, and is connected with, the fact of sole ownership. There is another way, in which the good-will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business; as by inserting a condition, that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place, where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account. Now it is evident, that in neither sense was the good-will of this trade at all considered, as among the subjects of the valuation to be made by either party. It was not so considered by the plaintiff, when he wrote his letter of the 21st of October. The words 'concern' and 'inheritance' are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And, when the plaintiff offers to take the business himself, he could not have forgotten, that the defendant's own estate of Butterwick lay contiguous to the partnership property, and therefore his introducing no stipulation, with reference to the fact of its contiguity, is a clear intimation, that when he wrote this letter, he had no intention, in offering to take the partnership property, to purchase with it the good-will, in the sense of restricting the defendant from carrying on the trade in its vicinity. In that sense, at least, therefore, the good-will of the trade was not the subject of contract, or treaty even, between the parties."

ness, as a rival.[1] It seems that good-will can constitute a part of the partnership effects or interests only in cases of mere commercial business or trade; and not in cases of professional business, which is almost necessarily connected with personal skill and confidence in the particular partner.[2]

§ 100. Under this head a curious question has arisen; and that is, whether the right to use the firm name is a part of the good-will belonging to the partnership, or whether in case of the dissolution thereof by the death of the partner, it belongs to the survivors. That the right to use the name of a known and celebrated firm, especially in the case of manufactures, is often a very valuable possession, is unquestionable; and, therefore, courts of equity will often interpose to protect the right against the abuse of third persons, in using it for their own advantage.[3] But it has been thought, that this right, however valuable, does not fall within the true character and nature of good-will; but that it belongs to the surviving partner.[4]

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[1] Collyer on Partn. B. 2, ch. 1, § 1, p. 102, 103, 2d edit.; Gow on Partn. ch. 5, § 4, p. 349, 350, 3d edit.

[2] Farr v. Pearce, 3 Madd. R. 75, 76; Collyer on Partn. B. 2, ch. 1, § 1, p. 103, 104, 2d edit.; Gow on Partn. ch. 5, § 4, p. 349, 350, 3d edit.

[3] Eden on Injunct. ch. 14, p. 314, 315; Motley v. Dowman, 3 Mylne & Craig, R. 1, 14, 15; Millington v. Fox, 3 Mylne & Craig, R. 338; 2 Story, Eq. Jur. § 951; Knott v. Morgan, 2 Keen, R. 213, 219; Webster v. Webster, 3 Swanst. R. 490, n.; Gow on Partn. ch. 2, § 4, p. 109, 3d edit.

[4] Lewis v. Langdon, 7 Sim. R. 421.—In this case the Vice-Chancellor (Sir L. Shadwell) said: "The question in this case depends on the right, in the surviving partner, to carry on the business under the name of the partnership. Lord Eldon, certainly, has expressed a doubt, in the case of Crawshay v. Collins (15 Ves. 227), upon what has been understood to be the proposition laid down by Lord Rosslyn, in the case of Hammond v. Douglas (5 Ves. 539). It is true, that the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party, rather than to another; and it

is also observable, that Lord Eldon might have been throwing out his observations with reference to a supposed connection between the place, where the business was carried on, and the good-will. But it occurs to me, that, if the good-will is to be considered as a salable article, which belongs to the partnership, then this consequence must follow, namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in order that the thing, which is said to be salable, may be preserved until it can be sold. If a partnership were carried on between A. and B. under the name of Smith & Co., and the surviving partner chose to discontinue the business, and to write to the customers, and say, that his partner was dead, and that the business was at an end, the effect would be, that that, which is said to be salable, would cease to exist. Now, what power is there in a court of equity, to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the good-will, as it is called, may be sold? It is plain, that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine, what shall be done with the good-will; and, if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that, upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor." See also Webster *v.* Webster, 3 Swanst. R. 490, n.

CHAPTER VII.

POWERS AND AUTHORITIES OF PARTNERS.

§ 101. As to the powers and authorities of the partners during the existence of the partnership (for their powers and authorities upon the dissolution thereof will be considered hereafter, in another place), they have been in part already suggested. In the first place, whenever there are written articles, or particular stipulations between the partners, these will regulate their respective powers and authorities *inter sese*, although not, if unknown, in their dealings with third persons.[1] But, independently of any such articles or stipulations expressed, each partner is *Præpositus negotiis societatis*, and each partner, *virtute officii*, possesses an equal and general power and authority in behalf of the firm, to transfer, pledge, exchange, or apply or otherwise dispose of the partnership property and effects, for any and all purposes within the scope and objects of the partnership, and in the course of its trade and business.[2] Or, as was said by a learned judge upon a recent occasion, "One partner by virtue of that relation (of partnership) is constituted a general agent for another as to

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[1] 3 Kent, Comm. Lect. 43, p. 40, 41, 42, 4th edit.; U. States Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Collyer on Partn. B. 3, ch. 1, p. 259, 260, 2d edit.

[2] 3 Kent, Comm. Lect. 43, p. 40 to 46, 4th edit.; Story on Agency, § 37, 39, 124; Collyer on Partn. B. 2, ch. 2, § 1, p. 129, 2d edit.; Gow on Partn. ch. 2, § 2, p. 36, 51 to 53, 3d edit.; 2 Bell, Com. B. 7, ch. 1, p. 615, 616, 5th edit.

all matters within the scope of the partnership dealings, and has communicated to him by virtue of that relation all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business, in which they are engaged. Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made."[1] The power extends also to assignments of property of the firm, as a security for antecedent debts, as well as for debts thereafter to be contracted on account of the firm.[2] Nor will it make any difference, whether the assignment be for the benefit of one creditor, or of several, or of all of the joint creditors.[3] But it may well admit of some doubt, whether this power extends to a general assignment of all the funds and effects of the partnership by one partner, for the benefit of creditors; for such an assignment would seem to amount of itself to a suspension or dissolution of the partnership itself.[4] [If,

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[1] Hawker v. Bourne, 8 Mees. & Welsb. 710.

[2] Harrison v. Sterry, 5 Cranch, R. 289; Anderson v. Tompkins, 1 Brock. Cir. R. 456; Tapley v. Butterfield, 1 Metc. R. 515.

[3] Ibid.

[4] Pierpont v. Graham, 4 Wash. Cir. R. 232; Dana v. Lull, 17 Vermont R. 390; Cullum v. Bloodgood, 15 Ala. 42; Deming v. Coet, 3 Sandf. 284; Hayes v. Hyer, 3 Sandf. Ch. R. 284; Wilson v. Soper, 13 B. Monroe, 411; Fisher v. Murray, 1 E. D. Smith, 341; Mabbett v. White, 2 Kernan, 442; Kemp v. Carnley, 3 Duer, 1; Kirby v. Ingersoll, 1 Dougl. (Mich.), 477, Harrington, Ch. R. 172; Dechart v. Filbert, 3 Watts & Serg. 454. — In this case, it was held, that after a dissolution of partnership, one partner could not make a voluntary assignment of the effects of the partnership for the benefit of creditors against the express dissent of his

however, one partner has abandoned all control of the business, an assignment by the other is valid, if an equal

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copartner. In Anderson *v.* Tomkins, 1 Brock. R. 456, Mr. Chief Justice Marshall affirmed the authority of one partner to assign all the partnership effects for the payment of the creditors thereof. On that occasion, he said: "It will be readily conceded, that a fraudulent sale, whether made by deed or otherwise, would pass nothing to a vendee concerned in the fraud. But, with this exception, I feel much difficulty in setting any other limits to the power of a partner, in disposing of the effects of the company, purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or of any number of articles. This power certainly would not be exercised in the presence of a partner, without consulting him; and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances. But with respect to the power, in a case perfectly fair, I can perceive no ground on which it is to be questioned. But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that, which is actually done every day, or is it that, which may be done, whenever the occasion for doing it presents itself? There are small traders, who scarcely ever, in practice, sell a piece of cloth uncut, or a cask of spirits. But may not a partner in such a store sell a piece of cloth, or a cask of spirits? His power extends to the sale of the article, and the course of trade does not limit him as to quantity. So with respect to larger concerns. By the course of trade is understood dealing in an article in which the company is accustomed to deal; and dealing in that article for the company. Tompkins and Murray sold goods. A sale of goods was in the course of their trade, and within the power of either partner. A fair sale, then, of all or of a part of the goods was within the power vested in a partner. This reasoning applies with increased force, when we consider the situation of these partners. The one was on a voyage to Europe, the other in possession of all the partnership effects for sale. The absent partner could have no agency in the sale of them. He could not be consulted. He could not give an opinion. In leaving the country, he must have intended to confide all his business to the partner, who remained, for the purpose of transacting it. Had this then been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction, which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one.

distribution is thereby secured.[1]] The doctrine, however, is strictly confined to personal property, and does

The quantum of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power, that these goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say, that the partner has exceeded his power. This is denominated a destruction of the partnership subject, and a dissolution of the partnership. But how is it a destruction of the subject? Can this appellation be bestowed on the application of the joint property, to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership is an association to carry on business jointly. This association may be formed for the future before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner had a right to dissolve this partnership. The act, however, of applying the means of carrying on their business to the payment of their debts, might suspend the operations of the company, but did not dissolve the contract, under which their operations were to be conducted." In Egberts *v.* Wood, 3 Paige, R. 517, 523, 524, Mr. Chancellor Walworth said: "It appears to be the better opinion, that one of the partners, at any time during the existence of the partnership, may assign the partnership effects, in the name of the firm, for the payment of the debts of the company, although by such assignment a preference is given to one set of creditors over another. In the case of Dickinson *v.* Legare and others, cited by the complainant's counsel from the Equity Reports of South Carolina, 1 Desauss. R. 57, the Court of Chancery of that State decided against the validity of an assignment of all the partnership effects, made by one of the partners, without the knowledge or consent of the other, to pay the debt of a particular creditor. Chancellor Matthews, who delivered the opinion of the court in that case, admits, that it was a question of the first impression, no case analogous to it having come under the view of the court. That assignment, however, was made under very peculiar circumstances. The company during the revolutionary war were doing business in this country. And while one of the partners was on a voyage to France, he was taken by a British ship of war, and carried as a prisoner to England, where he was prevailed upon by a creditor residing there, to give him a general assignment of all the partnership funds, which

[1] Kemp *v.* Carnley, 3 Duer, 1.

not extend to real estate held by the partnership; for in such a case the partner, who executes the deed of con-

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funds were then in this country, to secure the payment of his particular debt against the firm. Although the decision was put upon the general ground, that one partner had not the right to assign the partnership funds in this manner, without the consent of his copartner, there is no doubt that the particular circumstances, under which that assignment took place, had a very considerable influence in bringing the mind of the Chancellor to that result. The assignment in that case being made by a citizen of one of the United States, during the existence of the war, to an alien enemy and in an enemy's country, was probably void by the laws of war, so far at least as to prevent its being carried into effect by any of the courts of this country. And certainly it could not be considered, as made according to any mercantile usage. That decision, however, has been recently overruled by the Court of Appeals in the same State, in the case of Robinson *v.* Crowder, 4 McCord's L. R. 519; where it was held, that an assignment by one partner of all the effects of the firm in payment of the partnership debts was valid, as against his copartners. In Pierpont *v.* Graham, 4 Wash. C. C. R. 232, in the Circuit Court of the United States for the district of Pennsylvania, Judge Washington doubted the right of one of the partners, without the consent of the others, to assign the whole of the partnership effects in such a manner, as to terminate the partnership. But he declined expressing any decided opinion upon this question, which he considered unnecessary to the decision of the cause then before him; as, in that case, the copartner had subsequently assented to the assignment. In Mills *v.* Barber, 4 Day, R. 428, the Supreme Court of Errors in Connecticut decided, that one partner, without the knowledge of the other, might make a valid assignment of partnership funds, to secure the payment of a debt due from the firm. See Forkner *v.* Stuart, 6 Gratt. 197. And in Harrison *v.* Sterry, 5 Cranch, R. 300, the Supreme Court of the United States decided, that one of the partners might assign the partnership effects to a trustee, for the security or payment of the creditors of the firm, without the concurrence of his copartners. I do not intend, in this case, to express any opinion in favor of the validity of such an assignment of the partnership effects to a trustee by one partner, against the known wishes of his copartner, and in fraud of his right to participate in the distribution of the partnership funds among the creditors, or in the decision of the question, which of those creditors should have a preference in payment, out of the effects of an insolvent concern. As a Court of Equity, upon a proper application, would protect the rights of the several partners in this respect, before an assignment had actually been made, and if they could not agree among themselves, would appoint a receiver of the effects of the partnership, and would apply them in

veyance, can transfer no more title than he possesses; and he cannot transfer the property belonging to the

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payment of all the debts due from the firm ratably, it might perhaps apply the same rule to the case of an assignment to a trustee for the payment of the favorite creditors of one of the partners only, where the equitable rights of the parties had not in fact been changed by any proceedings under the assignment." — But in the subsequent case of Havens *v.* Hussey, 5 Paige, R. 30, 31, the Chancellor greatly qualified that opinion. On that occasion he said: "In the case of Egberts *v.* Wood, 3 Paige, R. 517, I had occasion to refer to most of the cases relative to assignments of partnership effects made by one of the copartners. And I then arrived at the conclusion, that, from the nature of the contract of copartnership, one of the partnership might make a valid assignment of the partnership effects, or so much thereof as was necessary for that purpose, in the name of the firm, directly to one or more of the creditors in payment of his or their debts; although the effect of such assignment was to give a preference to one set of creditors over another. But as it was not necessary for the decision of that case, I did not express any opinion, as to the validity of an assignment of the partnership effects by one partner, against the known wishes of his copartner, to a trustee, for the benefit of the favorite creditors of the assignor; in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the creditors, or in the decision of the question as to which of the creditors, if any, should have a preference in payment out of the effects of an insolvent concern. The present case presents that point distinctly for the decision of the court. And upon the most deliberate examination of the question, I am satisfied, that the decision of the Vice-Chancellor is correct; that such an assignment is both illegal and inequitable, and cannot be sustained. The principle, upon which an assignment by one partner in payment of a partnership debt rests, is, that there is an implied authority for that purpose from his copartner, from the very nature of the contract of partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid, and binding upon his copartner. One member of the firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the copartnership effects; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a copartnership, to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as

firm, whether it was conveyed directly to the firm, or held in trust; for it belongs to the partners as tenants

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that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the copartnership; as it renders it impossible for the firm to continue its business. The case of Harrison *v.* Sterry, 5 Cranch, R. 300, which, perhaps, has gone as far as any other on this subject, was not sustained as an assignment of all the partnership effects to a trustee for the payment of preferred creditors. It professed to be the transfer of a certain specific portion of the partnership property, for the purpose of saving the credit of the firm, and to raise funds to carry on the partnership business. And upon the ground, that it was not in fact what it professed to be, but was merely intended to give a preference to particular creditors, the court held the assignment void, as a fraud upon the bankrupt laws. It was only upon the supposition, that the assignment was in fact what it professed to be, that Chief Justice Marshall held it to be within the power usually exercised by a managing partner." In Hitchcock *v.* St. John, 1 Hoffm. R. 511, Mr. Vice-Chancellor Hoffman decided against the authority of one partner to make any general assignment, allowing preferences, and said: "The power to make a sale of the partnership effects resides in each partner while the relation exists. The power to bind the firm upon a purchase equally exists in each, although the goods never came into joint stock. All these instances of authority, as well as that to make negotiable paper, flow from the principle, that each is the agent of the whole. But for what is he such agent? For the purposes of carrying on the business of the firm, and because the authority to do the act is implied from the nature of the business. Best, J., in Barton *v.* Williams, 5 B. & A. 405. Now a transfer of all the effects of a firm for payment of its debts, is a virtual dissolution of the partnership. It supersedes all the business of the firm, as such. It takes from the control of each all the property, with which such business is conducted. The purposes of the business then clearly do not require that such a power should be implied. What other reason is there for holding, that by the contract of partnership it is to be inferred? I do not think, that the principle insisted upon by the counsel for the defendant is the true one, namely, that such a transfer is only invalid, when it operates as a fraud upon the other partner; when, for example, it is made against his wishes, and to give preferences, which he is unwilling to give. It strikes me, that the principle, upon which the invalidity is established, lies deeper. I consider, that neither, during the existence, nor after the dissolution of a partnership, can such a transfer be made, because of want of power in any one partner to make it. A direct payment of money, or a transfer of property to an acknowledged creditor,

in common, and neither of the partners can convey more than his undivided interest.[1]

§ 102. Each partner may, in like manner, enter into any contracts or engagements on behalf of the firm in the ordinary trade and business thereof; as, for example, by buying, or selling, or pledging goods, or by paying, or receiving, or borrowing moneys, or by drawing, or negotiating, or indorsing, or accepting bills of exchange, and promissory notes, and checks, and other negotiable securities, or by procuring insurance for the firm, or by doing any other acts, which are incident or appropriate to such trade or business, according to the common

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is an admitted and a necessary power, during the existence of the partnership. We probably are compelled by authorities to go so far as to say, that it is a necessary surviving power after a dissolution, in whatever way that is effected. All that is requisite to test the transfer is the amount of debt, and the extent of the fund assigned. But upon an assignment of the property of a firm to a trustee, a complication of duties and responsibilities is involved. An agent is appointed to control and dispose of the whole. The capacity, integrity, and industry of another are brought to the management; and the fitness of the party selected is judged of solely by one member of the firm. From what part or principle of the partnership relation can such an authority emanate? It is impossible to uphold a rule, which would rob every member of a firm of a voice and share in this last, and probably most important act of a failing house. It is no contradiction of this doctrine, that where the assignment is made after insolvency, and divides the funds with perfect equality among all the creditors, it will be supported. It is clear, that either partner might file a bill, obtain an injunction and receiver, and insure an equal distribution of all the funds. An assignment fairly securing the same equality is an object of favor in this court. In the absence of any indication on the part of the copartner of a contrary intention, it may well be inferred, that he consents to do justice. A serious question might indeed arise in a case in which, after such an assignment by one partner, the other should make a transfer of a specific piece of property, in payment of a just debt of the firm." There is no small difficulty in supporting the doctrine, even with these qualifications, that one partner may make a general assignment of all the partnership property.

[1] Anderson v. Tompkins, 1 Brock. Cir. R. 456, 463.

course and usages thereof.[1] So each partner may consign goods to an agent or factor for sale on account of

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[1] 3 Kent, Comm. Lect. 43, p. 40 to 42, 4th edit.; Story on Agency, § 37, 124; Collyer on Partn. B. 3. ch. 1, § 4, p. 282, 2d edit.; Id. B. 2, ch. 2, § 1, p. 128, 129; Id. B. 3, ch. 1, p. 259; Id. § 1, p. 263, 268 to 293; Gow on Partn. ch. 2, § 2, p. 36 to 69, 3d edit.; Id. ch. 4, § 1, p. 146, 147; Watson on Partn. ch. 4, p. 167, 2d edit.; Id. p. 195. — The cases on this subject are exceedingly numerous. Many of them will be found collected in the elementary writers in the pages above cited. See also Swan *v.* Steele, 7 East, R. 210; Hope *v.* Cust, cited by Lawrence, J., in 1 East, 53; Sandilands *v.* Marsh, 2 Barn. & Ald. 673; U. S. Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; South Carolina Bank *v.* Case, 8 Barn. & Cresw. 427; Livingston *v.* Roosevelt, 4 Johns. R. 251; Fisher *v.* Taylor, 2 Hare, R. 218, 229. In Winship *v.* Bank of United States, 5 Peters, R. 529, 561, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "Partnerships for commercial purposes; for trading with the world; for buying and selling from and to a great number of individuals; are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man, who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of business; which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person, with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner, who purchases on credit in the name of the firm, must bind the firm. This is a general authority, held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain, are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business,

the firm, and give instructions and orders relating to the sale.[1] All such contracts and engagements, acts and things, he has authority to make and do in the name of the firm, and, indeed, in order to bind the firm, they must ordinarily be made and done in the name of the firm, otherwise they will bind the individual partner only, who executes them, as his own private acts, contracts, or other things.[2] And this is entirely in coinci-

in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law." See also Hooper *v.* Lusby, 4 Camp. R. 66; Le Roy *v.* Johnson, 2 Peters, R. 198; Ex parte Agace, 2 Cox, R. 312; 2 Bell, Comm. B. 7, p. 615 to 618, 5th edit.

[1] 3 Kent, Comm. Lect. 43, p. 40 to 45, 4th edit.

[2] Kirk *v.* Blurton, 9 Mees. & Welsb. 284; Faith *v.* Richmond, 1 Adol. & Ellis, R. 339; Story on Agency, § 37, 39, 41, 147, 155, 161; Collyer on Partn. B. 3, ch. 1, § 4, p. 277, 278, 282, 2d edit.; Id. B. 3, ch. 2, § 2, p. 315 to 323, 2d edit.; Pothier, on Oblig. n. 83, and note by Evans; 3 Kent, Comm. Lect. 43, p. 41 to 44, 4th edit. — Mr. Chancellor Kent in his learned Commentaries, in the passage above cited, has summed up the doctrine in the following terms. "In all contracts concerning negotiable paper, the act of one partner binds all; and even though he signs his individual name, provided it appears on the face of the paper, to be on partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, in his own name only, and without appearing to be on partnership account, or if one partner borrow money on his own security, the partnership is not bound by the signature, even though it was made for a partnership purpose, or the money applied to a partnership use. The borrowing partner is the creditor of the firm, and not the original lender. If, however, the bill be drawn by one partner in his own name upon the firm, on partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. And though the partnership be not bound at law in such a case, it is held, that equity will enforce payment from it, if the bill was actually drawn on partnership account. Even if the paper was made in a case, which was not in its nature a partnership transaction, yet it will bind the firm, if it was done in the name of the firm, and there be evidence, that it was done under its express or implied sanction. But if part-

dence with the rule of the Roman law, as to joint employers of ships, against whom the exercitorial action

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nership security be taken from one partner, without the previous knowledge and consent of the others, for a debt, which the creditor knew at the time was the private debt of the particular partner, it would be a fraudulent transaction, and clearly void in respect to the partnership. So, if from the subject-matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge of that fact, the partnership was not liable. There is no distinction in principle upon this point, between general and special partnerships; and the question, in all cases, is a question of notice, express or constructive. All partnerships are more or less limited. There is none, that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances, or proof in the case, to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise. if the subject-matter of the contract was consistent with the partnership business; and the defendants in that case would be bound to show that the contract was out of the regular course of the partnership dealings. When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership, to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership, to mislead them, every man is presumed to know the extent of the partnership, with whose members he deals; and when a person takes a partnership engagement without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority, or its regular course of dealing, he is, in judgment of law, guilty of a fraud. It is a well-established doctrine, that one partner cannot rightfully apply the partnership funds to discharge his own preëxisting debts, without the express or implied assent of the other partners. This is the case, even if the creditor had no knowledge at the time of the fact of the fund being partnership property. The authority of each partner to dispose of the partnership funds, strictly and rightfully, extends only to the partnership business, though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner. But, if the negotiable paper of a firm be given by one partner on his private account, and that paper, issued within the general scope of the authority of the firm, passes into the hands of a *bonâ fide* holder, who has no notice, either actually or

lay. *Si plures navem exerceant, cum quolibet eorum in solidum agi potest. Ne in plures destringatur, qui cum uno contraxerit.*[1] *Jure societatis per sociam ære alieno socius non obligatur, nisi in communem arcam pecuniæ versæ sunt.*[2] This is also the rule of the French law,[3] and of the Scottish law.[4] Pothier says: Whatever may be the authority of

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constructively, of the consideration of the instrument; or if one partner should purchase, on his private account, an article, in which the firm dealt, or which had an immediate connection with the business of the firm, a different rule applies, and one, which requires the knowledge of its being a private, and not a partnership transaction, to be brought home to the claimant. These are general principles, which are considered to be well established in the English and American jurisprudence." In some cases, however, it is a matter of great nicety to decide, whether the partner alone is bound, or the partnership. Thus if a bill is drawn upon a firm, and is accepted by one of the firm in his own name, it will be treated as an acceptance of the firm. Wells *v.* Masterman, 2 Esp. R. 731; Mason *v.* Rumsey, 4 Camp. R. 384; Beach *v.* State Bank, 2 Carter, 488; Collyer on Partn. B. 3, ch. 1, § 2, p. 274, 275, 2d edit. So, where a note was drawn, "*I* promise," and was signed "for A. B. & C. — A.," it was held to bind the partnership. Hall *v.* Smith, 1 B. & Cresw. 407; Collyer on Partn. B. 3, ch. 1, § 2, p. 277, 278, 2d edit.; Lord Galway *v.* Mathew, 1 Camp. R. 403. See also Story on Agency, § 154, 275, 276; Doty *v.* Bates, 11 Johns. R. 544; Gow on Partn. ch. 2, § 2, p. 40 to 42, 3d edit.; Id. p. 49, 50; Watson on Partn. ch. 4, p. 214, 2d edit.; United States Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Faith *v.* Richmond, 3 Perr. & Dav. 187.

[1] Dig. Lib. 14, tit. 1, l. 25; Id. l. 2; Pothier, Pand. Lib. 14, tit. 1, n. 10; 1 Domat, B. 1, tit. 16, § 3, art. 6, 7; Dig. Lib. 14, tit. 1, l. 4, § 1, 2; 1 Domat, tit. 8, § 4, art. 16; Story on Agency, § 124, note.

[2] Dig. Lib. 17, tit. 2, l. 82; 1 Domat, B. 1, tit. 8, § 3, art. 10.

[3] Pothier on Oblig. n. 83.

[4] 2 Bell, Comm. B. 7, ch. 1, p. 615, 5th edit.; Ersk. Inst. B. 3, tit. 3, § 20. — Mr. Erskine says: "It hath been much disputed, how far an obligation, signed by one of the partners, affects the company or copartnery by the Roman law; as to which, a variety of distinctions hath been imagined by Doctors, to reconcile the different expressions of the Roman jurisconsults. According to our present practice, the partners in private companies generally assume to themselves a firm or name, proper to their own company, by which they may be distinguished in their transactions; and in all deeds subscribed by this name of distinction, every partner is, by the nature of copartnery, understood to be intrusted with a power from the company of binding them.

a partner, in order that a debt contracted by him should bind his partners, it is necessary that it should be contracted in the name of the firm.[1]

§ 102 *a*. In the remarks which have been already made, in respect to the power of each partner to bind the firm by bills of exchange, promissory notes, checks, and other negotiable instruments, we are to understand that this doctrine is not applicable to all kinds of partnership, but is generally limited to partnerships in trade and commerce, for in such cases it is the usual course of mercantile transactions, and grows out of the general

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Any one partner, therefore, who signs a bill, or other obligation, by the company's firm, obliges all the other partners; but where he subscribes a deed by his own proper subscription, the creditor, who followed his faith alone in the transaction, hath no action against the company, unless he shall prove, that the money lent or advanced by him was thrown into the common stock." Lord Stair says: "The same question is incident here, that before hath been touched concerning mandates, when one or more of the parties act in the matter of the society, whether thereby the whole society be obliged by the obligations of these? Whether obligations, made to these, constitute the society creditor? Or whether real rights, acquired by these, are *ipso facto* common to the society, or if there be but an obligation upon the actors to communicate the property always remaining in the actors, till they effectually communicate? The resolution of this being the same with that in mandates, we refer you thither, and say only this in general, that when these parties only act in the name of the society, and by its express warrant, or by what they have been accustomed to do, in so far they are not only partners but mandators, and it hath the same effect, as if the society had acted itself. But when they act not so, there doth only arise an obligement upon the partners-actors to communicate; in the mean time the property remaineth in the actors; and if transmitted to others before this communication, the society will be thereby excluded, but the actors will remain obliged for reparation of the damage and interest of the society. And this will hold, though things be bought or acquired by the common money of the society; but all the natural interest, birth, fruits, and profit of the society, is of itself and instantly, common to the society." Stair's Inst. B. 1, tit. 16, § 6, p. 159.

[1] Pothier, De Societé, n. 100, 101. But see Newton *v.* Boodle, 3 Manning, Granger & Scott, R. 792; Post, § 202.

customs and laws of merchants, which is a part of the common law, and is recognized as such.[1] But the same reason does not apply, or at least may not apply to other partnerships, unless indeed it is the common custom or usage of such business to bind the firm by negotiable instruments, or it is necessary for the due transaction thereof. Hence, attorneys who are in partnership have no implied authority to become parties to negotiable instruments, and to bind the firm thereby. [So an attorney has no implied power, as such, to bind his partner by receiving money to lay out on security for the depositor, and to hold the money in his hands until an opportunity offers for laying it out.[2]] The authority to do such acts must in such cases be either expressly given, or be recognized as proper and necessary, or in the usual course of the particular business of that firm.[3]

§ 103. This doctrine of the common law, as to the general right and authority of each partner to bind the firm, and act for the firm in all partnership transactions, equally applies to all cases of partnership in trade, whether the partners be all known, or some be secret or dormant partners;[4] [and it exists so long as the

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[1] Hedley *v.* Bainbridge, 3 Adol. & Ell. N. R. 316, 321.

[2] Harman *v.* Johnson, 18 Eng. Law & Eq. R. 400.

[3] Hedley *v.* Bainbridge, 3 Adol. & Ell. N. R. 316, 321.

[4] Dormant partners are bound by the written unsealed contracts of the ostensible partners, as much as by their parol contracts. But not, for technical reasons, by their sealed contracts. Beckham *v.* Drake, 9 Mees. & Welsb. R. 79, 91, 92, 94, overruling the case of Beckham *v.* Knight, 4 Bing. New Cas. 243; 1 Mann. & Gr. 738. See also Swan *v.* Steele, 7 East, R. 210; Sandilands *v.* Marsh, 2 Barn. & Ald. 673; U. S. Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 520; Collyer on Partn. B. 3, ch. 1, p. 259, 2d edit. The whole doctrine is well summed up by Mr. Chief Justice Marshall, in the case of Binney *v.* U. States Bank, 5 Peters, R. 529, 561,

relation continues, notwithstanding the objection of the other partners.[1]] It doubtless has its foundation in common convenience and public policy in regard to

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where he states the reasons of the general rule, and the application of it to dormant partnership. Immediately after the passage already cited (ante, § 102, note), he added as follows: "The counsel for the plaintiff in error supposes, that though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those, who trade with a firm on the credit of individuals, whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea, that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles. It has been supposed, that the principles laid down in the third instruction, respecting these secret restrictions, are inconsistent with the opinion declared in the first; that in this case, where the articles were before the court, the question, whether this was in its origin a secret or an avowed partnership, had become unimportant. If this inconsistency really existed, it would not affect the law of the case; unless the judge had laid down principles, in the one or the other instruction, which might affect the party injuriously. But it does not exist. The two instructions were given on different views of the subject, and apply to different objects. The first respected the parties to the firm, and their liability, whether they were or were not known, as members of it; the last applies to secret restrictions on the partners, which change the power held out to the world, by the law of partnership. The meaning of the terms 'secret partnership,' or the question, whether this did or did not come within the definition of a secret partnership, might be unimportant; and yet the question, whether a private agreement between the partners, limiting their responsibility, was known to a person trusting the firm, might be very important." See also Watson on Partn. ch. 5, p. 168 to 174, 2d edit.; Furze v. Sherwood, 2 Adol. & Ell. New R. 388, 417.

[1] Wilkins v. Pearce, 5 Denio, R. 541; Sage v. Sherman, 2 Comstock, R. 418.

all commercial operations, if indeed in a general view it might not be deemed almost a matter of moral necessity in the enlarged intercourse and trade of modern nations. If it were not admitted, then, it would be necessary, that every partner should expressly agree to, or confirm every transaction affecting the partnership, before it could acquire any absolute obligation, or be conclusive upon the partnership. The absence, or illness, or remote residence, of a single partner might greatly delay and retard, if it would not prostrate the best concerted enterprise or bargain; and before any negotiation could be completed, it would be indispensable, that the other contracting party should first by inquiry ascertain who all the parties were in any particular firm, and whether they had all deliberately assented thereto. The arrangements of commerce, which are now accomplished in a single hour or day, might thus require whole weeks, or even months, before they could be matured or established.[1] To avoid this difficulty, the common law has adopted a very satisfactory, and at the same time a very facile rule. It decides, that in the absence of any known, controlling stipulation between the parties, each partner shall be deemed invested by the consent of all of them with an equal and complete power of administration of the whole partnership property, funds, and affairs. It gives to all and each of the partners, what the Roman law allows to be delegated to one by a special authority, the entire administration of all the partnership business, and thereby, as such administrator, he may act for the whole, and in the name of the whole. *Si plures exerceant, unum autem*

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[1] Watson on Partn. ch. 4, p. 166, 167, 2d edit.; Gow on Partn. ch. 2, § 2, p. 36, 37, 3d edit.; Collyer on Partn. B. 2, ch. 2, § 1, p. 128, 129.

de numero suo magistrum fecerint, hujus nomine in solidum poterunt conveniri.[1]

§ 104. It has, therefore, been well remarked by a learned writer, that, "Although the general rule of law is, that no one is liable upon any contract, except such as are privy to it; yet this is not contravened by the liability of partners, as they may be imagined virtually present at, and sanctioning the proceedings, they singly enter into in the course of trade; or, as each is vested with a power, enabling them to act at once as principals, and as the authorized agent of their copartners. It is for the advantage of partners themselves, that they are thus held liable, as the credit of their firm in the mercantile world is hereby greatly enhanced, and a vast facility is given to all their dealings; insomuch, that they may reside in distant parts of the country, or in different quarters of the globe. A due regard to the interests of strangers is at the same time observed; for, where a merchant deals with one of several partners, he goes upon the credit of the whole partnership, and therefore ought to have his remedy against all the individuals who compose it."[2]

§ 105. Whenever, therefore, credit is given to a firm, within the scope of the business of that firm, whether the partnership be of a general or of a limited nature, it will bind all the partners, notwithstanding any secret reservations between them, which are unknown to those who give the credit. And no subsequent misapplication of the fund by the partner procuring it, to which the creditor is not a party, or privy,

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[1] Dig. Lib. 14, tit. 1, l. 4, § 1; Civil Code of France, art. 1836, 1857.

[2] Watson on Partn. ch. 4, p. 167, 168. See also Gow on Partn. ch. 2, § 2, p. 36, 37, 3d edit.

will exonerate them from liability. Thus, for example, if one partner should borrow money on the credit of the firm, which he should subsequently misapply to his own private purposes without any knowledge or connivance on the part of the lender, the firm would be bound therefor.[1]

§ 106. Nor will it make any difference in cases of this sort, as to third persons, whether the partnership is carried on for the benefit of the partners themselves alone, or for the benefit of others, who are the *cestuis que trust*, or beneficiaries. In each case the trustees and the *cestuis que trust*, or beneficiaries, will be equally bound by the acts of a single partner, and equally liable therefor to third persons.[2] The same rule applies, whether the partnership is carried on in a firm or company name, or in the name of one partner only. If in the name of the partner only, it will, however, be necessary to show, that the transaction was in the business, or upon the credit of the partnership, and not of that partner alone.[3]

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[1] United States Bank *v.* Binney, 5 Mason, R. 176, 187, 188; Etheridge *v.* Binney, 9 Pick. R. 272, 274, 275; Winship *v.* Bank of U. States, 5 Peters, R. 529; Buckner *v.* Lee, 8 Georgia, 291.

[2] Collyer on Partn. B. 3, ch. 1, p. 260; Thicknesse *v.* Bromilow, 2 Cromp. & Jerv. 428; Clavering *v.* Westley, 3 P. Will. 429; Furze *v.* Sherwood, 2 Adol. & Ell. New R. 388, 417, 418.

[3] Collyer on Partn. B. 3, ch. 1, § 2, p. 270 to 277, 2d edit.; Baker *v.* Charlton, 1 Peake, R. 111; 1 Mont. on Partn. p. 37, note (c); 2 Bell, Comm. B. 7, p. 615 to 618, 5th edit.; Swan *v.* Steele, 7 East, R. 210; U. States Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Buckner *v.* Lee, 8 Georgia, 291; Etheridge *v.* Binney, 9 Pick. R. 272; Ex parte Bolitho, Buck's Bankr. R. 100; South Carolina Bank *v.* Case, 8 B. & Cresw. 427; Manuf. & Mech. Bank *v.* Winship, 5 Pick. R. 11; Mifflin *v.* Smith, 17 Serg. & R. 165; Furze *v.* Sherwood, 2 Adol. & Ell. New R. 388, 417, 418. This last case involved the same point as was decided in U. States Bank *v.* Binney, 5 Mason, R. 176, and it was decided the same way.

§ 107. The like rule applies to other acts, done by any partner, touching the partnership business, and to any acknowledgments, representations, declarations, admissions, or undertakings of any partner relating thereto. Thus the representation of any fact, or a misrepresentation of any fact, made in any partnership transaction, by one partner, will bind the firm.[1] So, the acknowledgment of one partner, during the continuance of the partnership, of a debt, as due by the partnership, will amount to a promise, binding on the firm. So, the admission of any fact, by one partner, material as evidence in a suit, will, under the like circumstances, be deemed the admission of all the partners.[2] So, a part payment of a debt of the firm, by one partner, will not only extinguish *pro tanto* the partnership debt, but will, under the like circumstances, operate as an admission of the existence of the residue of the debt, binding on the partnership.[3] So, the acts of joint proprietors of stage-coaches, in relation to their partnership concerns, will be deemed the acts of all of them, and binding on

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[1] Gow on Partn. ch. 2, § 2, p. 55, 3d edit.; Id. 129, 130; Rapp *v.* Latham, 2 Barn. & Ald. 795; Collyer on Partn. B. 3, ch. 1, § 4, p. 290; Id. § 5, p. 296 to 298, 2d edit.; Lucas *v.* De la Cour, 1 Maule & Selw. 250; Blair *v.* Bromley, 5 Hare, R. 559.

[2] Pope *v.* Risley, 23 Misso. 185.

[3] Collyer on Partn. B. 3, ch. 1, § 4, p. 282 to 286, 290, 2d edit.; Lacy *v.* M'Neil, 4 Dowl. & Ryl. 7; Pittam *v.* Foster, 1 Barn. & Cresw. 248; Burleigh *v.* Stott, 8 B. & Cresw. 36.—The authorities are all agreed on this point, during the existence of the partnership. But whether such an acknowledgment or admission, or promise, or payment by one partner, after the dissolution of the firm, will bind the others, is a matter upon which there are conflicting authorities; and the point will be hereafter discussed in another connection. See Bell *v.* Morrison, 1 Peters, R. 351, 373; 3 Kent, Comm. Lect. 42, p. 49, 50, 4th edit.; Whitcomb *v.* Whiting, 2 Doug. R. 652; Brisban *v.* Boyd, 4 Paige, R. 17.

all.[1] So, notice to or by one of a firm is deemed notice to or by all of them.[2]

§ 108. The principle extends further, so as to bind the firm for the frauds committed by one partner in the course of the transactions and business of the partnership, even when the other partners had not the slightest connection with, or knowledge of, or participation in the fraud;[3] for (as has been justly observed), by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns.[4] Hence, if in the business of the partnership, money is received, partly by one of the firm and partly by another, to be laid out upon a mortgage, and a mortgage is forged by one partner, without the knowledge of the other, the innocent partner will be liable for the whole money.[5] So, if representations of certain facts, as existing, are fraudulently made by one partner, unknown to the others, in the partnership business, and the facts never existed, but

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1 Collyer on Partn. B. 3, ch. 1, § 4, p. 287, 288, 2d edit.; Helsby *v.* Mears, 5 B. & Cresw. 504.

2 Collyer on Partn. B. 3, ch. 1, § 4, p. 290 to 292, 2d edit.; Bignold *v.* Waterhouse, 1 Maule & Selw. 249; Haywood *v.* Harmon, 17 Ill. 477; Bouldin *v.* Page, 24 Misso. 594.

3 Pierce *v.* Wood, 3 Foster, 520; Locke *v.* Stearns, 1 Metc. R. 560.

4 Gow on Partn. ch. 2, § 2, p. 55; Id. ch. 4, § 1, p. 146, 147, 148, 3d edit.; Collyer on Partn. B. 3, ch. 1, § 5, p. 293 to p. 304, 2d edit.; Watson on Partn. ch. 4 p. 175, 2d edit.

5 Willett *v.* Chambers, Cowp. R. 814; Stone *v.* Marsh, 1 Ryan & Mood. R. 364; 6 Barn. & Cresw. 561; Hume *v.* Bolland, 1 Ryan & Mood. 371; Keating *v.* Marsh, 2 Clark & Finell. 250; Manuf. & Mech. Bank *v.* Gore, 15 Mass. R. 75; Boardman *v.* Gore, 15 Mass. R. 331; Blair *v.* Bromley, 5 Hare, R. 542. [But see Sims *v.* Brutton, 1 Eng. Law & Eq. R. 446.]

the whole statement is a mere fiction, the firm will be bound to the same extent, as if it were true, and the facts existed.[1] [And in Equity the limitation in bar of the claim in such cases does not begin to run until the time of the discovery of the fraud.][2] This whole doctrine proceeds upon the intelligible ground, that, where one of two innocent persons must suffer by the act of a third person, he shall suffer, who has been the cause or occasion of the confidence and credit reposed in such third person.

§ 109. The French law has adopted a rule essentially the same, as that of the common law. The administration of the affairs of the partnership may be delegated or intrusted to one or more of the partners.[3] But in the absence of any stipulation to this effect, the partners are deemed to have given reciprocally to each other the power of administering the one for the other; and what each one does is valid even for the share of his partners, without his having obtained their consent.[4]

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[1] Rapp *v.* Latham, 2 Barn. & Ald. 795; Hume *v.* Bolland, 1 Ryan & Mood. 371; Beach *v.* State Bank, 2 Carter, 488; Doremas *v.* M'Cormick, 7 Gill, 49; Sweet *v.* Bradley, 24 Barbour, 549; Hawkins *v.* Appleby, 2 Sandf. 421.

[2] Blair *v.* Bromley, 5 Hare, R. 542. See Sims *v.* Brutton, 1 Eng. Law & Eq. R. 446.

[3] Code Civil of France, art. 1856, 1857; Pothier, De Societé, n. 66, 67, 89, 90, 96, 98; Pothier on Oblig. n. 83; Code of Louisiana (of 1825) art. 1841.

[4] Code Civil of France, art. 1859; Pothier, De Societé, n. 90 to n. 100; Pothier on Oblig. n. 83, 89.—Pothier (on Obligations, n. 83) has expounded the reason of this doctrine exactly as it would be stated at the common law. "We are also deemed to contract by the ministry of our partners, when they contract, or are regarded as contracting for the affairs of the partnership. For, by entering into the partnership with them, and permitting them to transact the business of it, we are deemed to have adopted and approved beforehand of all the contracts, which they may make for the affairs of the partnership, as if we had contracted jointly

In these respects the French law differs (as has been already suggested) from the Roman law; for the latter

with them, and we have acceded beforehand to all the consequent obligations. A partner is deemed to contract for the affairs of the partnership, whenever he adds to his signature the words, *and Company*, although afterwards the contract does not turn to the benefit of the partnership. For instance, if he borrows a sum of money, for which he gives a note with the words, *and Company*, added to his signature, although he has employed the money in his private affairs, or lost it at play, he is still deemed to have contracted for the affairs of the partnership, and consequently obliges his partners as having borrowed the money jointly with him, and as having contracted by his ministry. For his partners must take the consequence of having entered into their engagement with such a person; but those, who contract with him, ought not to be deceived and suffer by his want of fidelity. The signature, *and Company*, does not, however, oblige my partners, if it appears by the very nature of the contract, that it does not concern the affairs of the partnership; as if I put that signature to the lease belonging to myself and not to the company. When the partner does not sign *and Company*, he is deemed to have only contracted for his own private affairs, and does not bind his partners, unless the creditor shows by other proof, that he contracted in the name of the partnership, and that the contract actually related to the partnership affairs." See also Story on Agency, § 124, note (1), and Pothier on Oblig. n. 447, 448; Pothier, De Societé, n. 96. Mr. Bell in his learned Commentaries (2 Bell, Comm. B. 7, p. 611, 5th edit.) has made some very appropriate remarks on the state of the Roman law. "Partnership is thus a contract involving important relations to the public, as well as to the contracting partners. In the infancy of trade it is little regarded or understood; and no proofs perhaps are more decisive of the low state of mercantile intercourse in Rome, than the very imperfect state of the Roman jurisprudence with respect to partnership. In the simple view of partnership as a mere society, in all that relates to the shares of parties accidentally associated as joint proprietors, or the rules of contribution and division in the management of a common stock or concern, there is no defect in the Roman law. But the subject is never contemplated in that more delicate and important light, which presents for decision the interests and dealings of the company with third parties, and the powers of partners to pledge the stock and credit of the society with the individual responsibility of the partners. In modern times, the effect of this contract, in its relations to third parties, are by far the most important. The question in this view is, not what share or profit, or what proportion of loss, upon a common stock, each partner is to gain or to suffer; but what are the rights of those, who deal with the company, in claiming

did not ordinarily clothe one partner (any more than any other agent) with the power of generally administering the affairs of the partnership, unless it was especially delegated and confided to him. Under other circumstances, each one could act only for his own share, and so bind himself.[1] *Nemo ex sociis plus parte suâ potest alienare, etsi totorum bonorum socii sint.*[2] *Item magistri societatum pactum et prodesse et obesse constat.*[3] *Si socius propriam pecuniam mutuo dedit, omnino creditam [pecuniam] facit, licet cæteri dissenserint. Quod, si communem [pecuniam] numeravit, non alias creditam efficit, nisi cæteri quoque consentiant; quia suæ partis tantum alienationem habuit.*[4] This delegation of the administration of the

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preferably on its common stock, and what responsibility is undertaken by the several partners for contracts *bonâ fide* entered into by third parties? In this inquiry, be the reciprocal rights and liabilities of the partners what they may in respect to each other, they each, in their relation to the public, hold an authority, which no force of private stipulation can alter or restrain; and by means of which, in the face of the most express injunctions or prohibitions of their contract, the several partners, or even those perhaps, who may long have left the partnership, may, by the act of any one of the number, be made responsible to third parties to the whole extent of their private fortune. It is in this view chiefly, that definitions of partnership (which, like all others, are proverbially dangerous, seldom useful,) are to be received with peculiar caution, if borrowed or derived from the writings of the civilians; who neglect almost entirely the implied power and unlimited mandate of the partners to bind the rest. Even in the writings of some modern lawyers, this limited character appears in their definitions of partnership, while their doctrine extends to consequences which are not presented prominently in the description." See post, note (5), of this section.

[1] Pothier, Pand. Lib. 17, tit. 2, n. 26 to 29; 1 Domat, B. 1, tit. 8, § 4, art. 16; Dig. Lib. 17, tit. 2, l. 68; Story on Agency, § 124, note (1); Id. § 425 to 427; Ante, § 102.

[2] Dig. Lib. 17, tit. 2, l. 68; Pothier, Pand. Lib. 17, tit. 2, n. 26, 27.

[3] Dig. Lib. 2, tit. 14, l. 14; Pothier, Pand. Lib. 2, tit. 14, n. 46; 1 Domat, B. 1, tit. 8, § 4, art. 16; Pothier De Société, n. 89.

[4] Dig. Lib. 12, tit. 1, l. 16; Pothier, Pand. Lib. 12, tit. 1, n. 12; 1 Domat, B. 1, tit. 8, § 4, art. 16.

partnership, or assent to any contract made by one partner, need not, under the Roman law, be express; but might be implied from circumstances. But it has been a matter of no small discussion among the civilians, what circumstances were sufficient for such a purpose.[1]

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1 Story on Agency, § 124, n. (1); Pothier, De Societé, n. 96. — In these respects the Roman law seems to have followed out its own doctrines respecting the rights, duties, and obligations of principals and agents. The following statement of the general provisions of that law on this subject may not be unacceptable. By the Roman law, as it originally stood, the principal could not ordinarily sue or be sued on the contract made through the instrumentality of his agent; but the latter was generally treated as the proper and sole contracting party. This was subsequently altered by the edicts of the Prætor, so far as it respected the rights of third persons to institute suits against the principal, in cases falling within the reach of the exercitorial and institorial actions. But the exercitorial action did not lie in favor of the owner or employer (exercitor) against the other contracting party. He was not, however, without a remedy; for, if there was a contract of hire with the master, the owner or employer might recover the hire in a direct action *ex locato;* if it was a gratuitous contract, he might maintain an action *ex mandato.* So the Digest has declared. Sed ex contrario, exercenti navem adversus eos, qui cum magistro contraxerunt, actio, non pollicetur, quia non eodem auxilio indigebat; sed aut ex locato cum magistro, si mercede operam ei exhibet; aut si gratuitam, mandati agere potest. The institorial action was, also, in its terms apparently limited to suits against the principal. Æquum Prætori visum est, sicut commoda sentimus ex actu Institorum, ita etiam obligari nos ex contractibus ipsorum et conveniri. But no like action lay against the other contracting by the principal. However, he was not without remedy; since, by a cession of the right of action from the Institor, he might, in some cases, maintain a suit founded thereon against the other party. Sed non idem facit circa eum, qui Institorem præposuit, ut experiri possit. Sed, si quidem servum proprium Institorem habuit, potest esse securus, acquisitis sibi actionibus. Si autem vel alienum servum, vel etiam hominem liberum, actione deficieter. Ipsum tamen Institorem, vel Dominum ejus convenire poterit, vel mandati, vel negotiorum gestorum. It is added: Marcellus autem ait, debere dari actionem ei, qui Institorem præposuit, in eos, qui cum eo contraxerint. And Gaius held, that the principal might maintain the suit, if he could not otherwise vindicate his right; Eo nomine, quo Institor contraxit, si modo aliter rem suam servare non potest. In special cases, also, where

§ 110. The limitations at the common law, upon this authority of each partner to bind the partnership, may

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the contract, made through an agent, was declared to be directly obligatory between the principal and the other contracting party (as, for example, in case of a sale), the principal might maintain a direct action thereon. Thus, the Digest puts it: Si Procurator vendiderit, et caverit emptori; quæretur, an Domino, vel adversus Dominum actio dari debeat? Et Papinianus (Lib. 3, Responsorum), putat, cum Domino ex empto agi posse utili actione, ad exemplum Institoriæ actionis si modo rem vendendam mandavit; ergo et per contrarium, dicendum est, utilem ex emptio actionem Domino competere. But, except in these and a few other cases, the general rule seems to have prevailed in the Roman law, that reciprocal actions lay in cases of agency only between the direct and immediate parties thereto. The modern nations of continental Europe seem, with great wisdom, to have adopted the general doctrine of allowing reciprocal actions between the principal and the other contracting parties, where it is not excluded by the nature, or express terms of the contract. The rights of principals against third persons, arising from the acts and contracts of their agents, may be further illustrated by the consideration of payments made to or by the latter. And, first, in relation to payments made to agents. Such payments are good, and obligatory upon the principal in all cases, where the agent is authorized to receive payment, either by express authority, or by that resulting from the usage of trade, or from the particular dealings between the parties. In such cases, the maxim of the Roman law is justly applied; Quod jussu alterius solvitur, pro eo est, quasi ipsi solutum esset. But, the principal may intercept such payment, by giving notice to the debtor not to pay to the agent, before the money is paid; and, in such a case, if the agent has no superior right, from a lien or otherwise, any subsequent payment, made to the agent, will be invalid, and the principal may recover the money from the debtor. Story on Agency, § 425 to 429; Id. § 163, 261, 271. See, also, on this subject, Pothier on Oblig. n. 54 to 84, and especially n. 82, 83, 447, 448. Pothier (n. 82) says: "We contract through the ministry of another, not only when a person merely lends us his ministry by contracting in our name and not in his own, as when we contract by the ministry of a tutor, curator, agent, &c., in their quality as such. We are also deemed to contract by the ministry of another, though he contracts himself in his own name, when he contracts in relation to the affairs which we have committed to his management; for we are supposed to have adopted and approved, beforehand, of all the contracts, which he may make respecting the affairs committed to him, as if we had contracted ourselves, and are held to have acceded to all the obligations resulting therefrom. Upon this principle is founded the Actio Exercitoria, which those, who have

be readily deduced from what has been already stated. The authority can be exercised only in cases falling within the ordinary business and transactions of the firm, where the other party has no knowledge or notice, that the partner is acting in violation of his duties and obligations to the firm, or for purposes disapproved of by the firm, or in fraud of the rights thereof.[1]

§ 111. In the first place, the authority, to be valid, must be exercised in cases within the scope of the ordinary business and transactions of the firm.[2] Thus, for example, in cases of factorage, it is a common, although not an invariable usage, to guaranty the solvency of the purchasers on sales made by the factor, and to receive therefor a commission *del credere;* and this would be deemed an authority within the scope of a partnership, formed for factorage purposes, although it could not be shown, that the partners had stipulated

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contracted with the master of a ship for matters relative to the conduct of such ship, have against the proprietor, who has appointed the master. Upon the same principle is founded the Actio Institoria, which those, who have contracted with the manager of a commercial concern, or a manufactory, have against the employer (le commettant); and the Actio utilis institoria, which relates to contracts made with a manager, of any other kind. Observe, there is a difference between these managers, and tutors, curators, syndics, &c. When these managers contract, they contract themselves, and enter into a personal obligation. Their employers are only regarded as accessary to their contracts, and to the obligations resulting from them; whereas the others do not contract themselves, but only afford their ministry in contracting, and therefore do not oblige themselves, but only those who contract by their ministry." See Ante, note (2) of this section.

[1] Collyer on Partn. B. 3, ch. 1, p. 259 to p. 282, 2d edit.; Story on Agency, § 125; Ex parte Agace, 2 Cox, R. 312; Watson on Partn. ch. 4. p. 180, 2d edit.; Farrar v. Hutchinson, 9 Adol. & Ellis, 641.

[2] Watson on Partn. ch. 4, p. 180, 194, 2d edit.; Sandilands v. Marsh, 2 Barn. & Ald. 677, 679.

for that power in their articles of partnership, or even if they had excluded it by such articles, if it was unknown to the principal, for whom they were dealing.[1] So, it is the common course of business for persons engaged in the purchase and sale of horses, to give a warranty on sales made by them; and therefore a warranty, made in the course of such business by one partner, would bind the partnership, notwithstanding the articles prohibited such warranty, if the purchaser were unacquainted therewith.[2] On the other hand, where it is not the common course of the business, in which a partnership is engaged, to give letters of guaranty or of credit, if one partner should give such a letter of guaranty or credit, it would not be binding on the firm, although given in the name thereof.[3] [And although such guaranty might be convenient and reasonable for accomplishing the objects of the partnership, it would not be binding upon the other partners without their recognition or adoption, unless it was reasonably *necessary* for the business of the partnership.[4]]

§ 112. For the like reason, if one partner should in the name of the firm make purchases of goods, not connected with the known business of the firm, such

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[1] See Sandilands *v.* Marsh, 2 Barn. & Ald. 678; Collyer on Partn. B. 3, ch. 1, § 3, p. 279, 280, 281; Hope *v.* Cust, 1 East, R. 48; Ex parte Nolte, 2 Glyn & Jam. 306.

[2] Collyer on. Partn. B. 3, ch. 1, § 260; Sandilands *v.* Marsh, 2 Barn. & Ald. 679, per Abbott, C. J.

[3] Collyer on Partn. B. 3, ch. 1, § 3, p. 279, 280; Hope *v.* Cust, 1 East, R. 48; Duncan *v.* Lowndes, 3 Camp. R. 478; Hasleham *v.* Young, 5 Adol. & Ell. New R. 833.

[4] Bettel *v.* Williams, 4 Welsby, Hurlstone & Gordon, 623. Overruling whatever is contrary in Gardom ex parte, 15 Ves. 286.

purchases would not bind the partnership. Thus, for example, if a partnership is engaged in the mere business of selling dry goods by wholesale or retail, unconnected with navigation, a purchase of a ship by one partner, in the name of the firm, would not be binding on the other partners, unless they should assent thereto. So, if persons are engaged in the mere business of tallow chandlers, as partners, a purchase of a cargo of flour, or of pepper, or of coffee, or of other things by one partner, wholly beside the business of the firm, would not bind the other partners. But if the articles were such, as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts.

§ 113. The real difficulty in many cases of this sort is to ascertain what contracts, engagements, and acts are properly to be deemed within the scope of the particular partnership, trade or business; for these are not exactly the same in all sorts of trade or business. On the contrary, in many cases, rights, powers, and authorities over the partnership property and partnership concerns exist either by usage, or by general understanding, or by natural implication, which are wholly unknown in others. To answer the inquiry, then, satisfactorily, it is not enough to show, that in other trades or other business, certain rights, powers, and authorities are incident thereto, and may be lawfully exercised by each of the partners; but we must see, that they appropriately belong to, or are, by usage or otherwise,

implied or incidental to the particular trade or business in which the partnership is engaged.[1]

§ 114. Having enumerated some of the general powers and authorities, which ordinarily belong to partnerships, and the general limitations thereof (a subject which will more fully occur hereafter in other connections), it may be proper here to state, in further illustration of the foregoing remarks, what powers and authorities are not ordinarily deemed to be within the scope of partnerships, and which therefore require some special delegation or solemn instrument to confer them. And, in the first place, it may be laid down as a generally recognized principle, that one partner has no power or authority to submit or refer to arbitration any matters whatsoever, concerning or arising out of the partnership business.[2] The reason assigned is, that it is not within the scope of the ordinary business or of the powers or authorities necessary or proper to carry on the business of the partnership.[3] Another reason is, that the award may call upon the partners to do acts, which they might not otherwise be compellable to per-

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[1] Dickinson *v.* Valpy, 10 Barn. & Cresw. 128.

[2] Com. Dig. *Arbitrament*, D. 2; 2 Bell, Comm. B. 7, p. 618, 5th edit.; Stead *v.* Salt, 3 Bing. R. 101; Hambridge *v.* De la Crouée, 3 Manning, Granger & Scott, R. 742; Adams *v.* Bankart, 1 Cromp. Mees. & Rosc. 681; Karthaus *v.* Ferrer, 1 Peters, R. 222, 228; Strangford *v.* Green, 2 Mod. R. 228; Bachoz *v.* Grandjean, 1 Mann. 367; Harrington *v.* Higham, 13 Barb. 660; Abbott *v.* Dexter, 6 Cush. 108; Armstrong *v.* Robinson, 5 Gill & Johns. 412; Buchanan *v.* Curry, 19 Johns. R. 137; Wood *v.* Shepherd, 2 P. & H. (Virg.), 442; 3 Kent, Comm. Lect. 43, p. 49, 4th edit.; Ersk. Inst. B. 3, tit. 3, § 23. — In Pennsylvania and Kentucky a different doctrine is established; that one partner may by an unsealed instrument refer any partnership matter to arbitration, which will bind the partnership. Taylor *v.* Coryell, 12 Serg. & R. 243; Southard *v.* Steele, 3 Monroe, R. 433. See Catlin *v.* Evans, 1 Dev. & Batt. 284; per Lord Abinger in Cleworth *v.* Pickford, 7 Mees. & Welsb. R. 314, 321.

[3] Ibid.

form.[1] But the soundest reason seems to be, that, as it takes away the subject-matter from the ordinary cognizance of the established courts of justice, which have the best means to investigate the merits of the case by proper legal proofs and testimony, and the means of arbitrators to accomplish the same purposes are very narrow, and often wholly inadequate, it ought not to be presumed, that the partners mean to waive their ordinary legal rights and remedies, unless there be some special delegation of authority to that effect, either formal or informal.[2]

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[1] Gow on Partn. ch. 2, § 2, p. 66; Adams *v.* Bankart, 1 Cromp. Mees. & Rosc. R. 68. [It has been decided, that one partner has no implied authority to consent to an order for judgment in an action against himself and his copartner. Hambridge *v.* De la Crouée, 3 Manning, Granger & Scott, R. 742; Binney *v.* Le Gal, 19 Barb. 592; Morgan *v.* Richardson, 16 Missouri, 409. And service of a writ on one partner, *after* dissolution, will not authorize judgment against the other. Farer *v.* Briggs, 18 Ala. 478. An acknowledgment of service of a writ written by one partner in presence of the other, and with his consent, binds the firm. Freeman *v.* Carhart, 17 Geo. 348. An appearance in a suit entered by an attorney, employed by one of the partners, will be binding and conclusive upon the other partners. Bennett *v.* Stickney, 17 Verm. R. 531. But such appearance by an attorney employed by one partner, has been construed to be only an appearance for the partners, *as partners*, and for the purpose of defending the action against the firm, and not as an appearance for the partners, individually and severally, and such an appearance will not bind one partner individually, who is without the jurisdiction, and not served with process, and did not authorize the appearance, so as to render the judgment *every where* conclusive against him. Phelps *v.* Brewer, 9 Cush. 390.]

[2] See Adams *v.* Bankart, 1 Cromp. Mees. & Rosc. 681; Bruen *v.* Marquand, 17 Johns. R. 58; 3 Kent, Comm. Lect. 43, p. 44, 4th edit.; Boyington *v.* Boyington, 10 Verm. 107.—Mr. Gow, in the Supplement to his Treatise on Partnership, London, 1841, ch. 2, § 2, p. 17, says: "In the case of Boyd *v.* Emerson (2 Adoll. & Ell. 184), one question was, whether a partner could bind his copartners by a parol submission to arbitration. But the case being disposed of on other points, it became unnecessary to decide that question. However, Sir F. Pollock, who had to maintain the affirmative, in the course of his argument observed, that the point might be considered as *res integra*, and admitted that 'one partner cannot bind another

§ 115. It may not perhaps seem very easy to see, since one partner alone may release, or even compound, or compromise a partnership debt,[1] in what essential respect the latter power differs from that, which respects a submission to arbitration. A release by one partner certainly binds all the partners, as indeed a

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in a matter of arbitration, where the submission is by deed; because, in general, he cannot bind his partner by any deed. (Harrison *v.* Jackson, 7 T. R. 207.) But it does not follow that one of several persons, who are general partners, cannot in any way bind the rest by a submission to arbitration, upon a specific matter of partnership right. One partner may bring, or settle an action on behalf of the rest (Furnival *v.* Weston, 7 B. Moore, 356; Harwood and others *v.* Edwards, Gow on Partn. 65, note (g) 3d edit.). Why may he not enter into an agreement to refer the subject-matter? And if so, why may not one agree, on behalf of the rest, to be governed by an opinion, in which both they and the opposite party may confide? In Strangford *v.* Green (2 Mod. 228), the submission appears to have been by arbitration bond, and therefore the partner could not be bound. In Stead *v.* Salt (3 Bing. 101), the parties were not partners generally, but only in the dealings, to which the award related; the matter was twice referred. In the first instance, four partners signed the agreement of reference; the arbitration went off, and the new agreement was signed by three only. In the absence of any explanation, it was reasonable to suppose, that if both agreements were signed by the authority of all the partners, the second would have been executed by the same number as the first. The passage cited in that case, from Com. Dig. (*Arbitrament*, D. 2), from which it was implied, that a partner cannot bind his copartner, probably refers to submissions by deed. There is no ground in reason for saying, that in the case of a general partnership in a banking firm, one partner cannot submit, on behalf of all, to such a mode of settling a dispute upon a partnership concern as was adopted here. Suppose the question had been a practical one, as to something to be done in the course of business, might not a partner have agreed to take the judgment of an experienced person, as a custom-house officer, a dock-master, or an eminent merchant? And if so, why not the opinion of counsel in the present case? To hold, that the opinion could not be so taken, would throw great impediments in the way of a very common, useful, and economical mode of settling such disputes." See post, § 122, note (1).

[1] See Gow on Partn. ch. 2, § 2, p. 61, 3d edit., and Ellison *v.* Darell, there cited; Metcalf *v.* Rycroft, 6 M. & Selw. 75; Collyer on Partn. B. 3, ch. 2, § 1, p. 311, 312, 2d edit.; Hambridge *v.* De la Croucé, 3 Manning, Granger & Scott, 742.

receipt for the debt would; because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon due payment.[1] There is another technical reason, applicable to such a case; which is, that the release certainly operates as against the partner himself; and if so, since no suit could be brought for the debt without uniting him as plaintiff, the release of one plaintiff would necessarily bar the action as to the others.[2] The compromise of a debt, by taking less than its nominal amount, seems to be an incident to the collection of the debt, and may fairly, therefore, be deemed within the discretion confided to each partner; and indeed in practice it is so ordinarily treated. These cases, therefore, seem clearly distinguishable from that of a submission to arbitration, since they steer wide of the objections, which have been already mentioned, as applicable to the latter.

§ 116. The Roman law coincides in many respects

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[1] Stead *v.* Salt, 3 Bing. R. 101; Collyer on Partn. B. 3, ch. 2, § 1, p. 313, 314; Id. B. 3, ch. 4, § 2, p. 452, 453; Id. B. 3, ch. 5, § 5, p. 485, 2d edit.; Pierson *v.* Hooker, 3 Johns. R. 68; Watson on Partn. ch. 4, p. 225, 2d edit.; Story on Agency, § 49.

[2] See Adams *v.* Bankart, 1 Cromp. Mees. & Rosc. 681; Watson on Partn. ch. 4, p. 222, 2d edit.; Collyer on Partn. B. 3, ch. 2, § 1, p. 311, 312, 2d edit.; Hawkshaw *v.* Parkins, 2 Swanst. R. 542; Halsey *v.* Whitney, 4 Mason, R. 206; Pierson *v.* Hooper, 3 Johns. R. 68; Bulkley *v.* Dayton, 14 Johns. R. 387; Bruen *v.* Marquand, 17 Johns. R. 58; Ruddock's case, 6 Co. R. 25 a; Salmon *v.* Davis, 4 Binn. R. 375; Napier *v.* Rapelie, 9 Wend. R. 120. — But although one partner may release a debt of the partnership in his own name alone; yet, if he enters into a covenant in his own name with a debtor of the partnership, not to sue him therefor, that is no release of the debt; and will not prevent a suit from being maintained by a partner, in the names of all the partners for the debt. The remedy for the debtor in such a case is by a suit against that partner for breach of his covenant. Walmsey *v.* Cooper, 3 Perr. & Dav. R. 149; s. c. 11 Adol. & Ellis, 216; Post, § 323, 324.

with ours on this subject. It admits a release or discharge by one joint creditor to the debtor, or a release or discharge to one joint debtor by the creditor, to be an extinguishment of the entire contract. *Cum duo eandem pecuniam aut promiserint, aut stipulati sunt, ipso jure et singuli in solidum debentur, et singuli debent. Ideoque petitione acceptilatione unius tota solvitur obligatio.*[1] And yet by the Roman law it is not competent for one of two creditors, or for one of two partners, to compromise a suit, or to submit a controversy touching their joint demands to arbitration, without the consent of both; for in such a case each can act only as the agent of the other; and a general authority is not deemed to include such a right. *Mandato generali non contineri etiam Transactionem, decidendi causâ interpositam.*[2] The same doctrine is fully recognized in the law of France,[3] and probably in that of many other nations of continental Europe.

§ 117. In the next place it is a general rule of the common law, that one partner, from that mere relation cannot bind the others by a deed or instrument under seal, either for a debt or any other obligation, even when contracted in the course of their commercial dealings and business, and within the scope thereof; unless indeed the authority be expressly given under the seals of the other partners, and include the very act done under seal.[4] The reason of this rule seems to

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[1] Dig. Lib. 45, tit. 2, l. 2.

[2] Dig. Lib. 3, tit. 3, l. 60; Domat, B. 1, tit. 15, § 3, art. 11.

[3] Pothier, de Societé, n. 68.

[4] Watson on Partn. ch. 4, p. 218 to 222, 2d edit.; Collyer on Partn. B. 3, ch. 2, § 1, p. 308 to 312, 2d edit.; Gow on Partn. ch. 2, § 2, p. 57 to 60, 3d edit.; 3 Kent, Comm. Lect. 43, p. 47 to 49, 4th edit.; Story on Agency, § 49 to 51; Dickerson *v.* Wheeler, 1 Humph. R. 51; Napier *v.* Catron, 2 Humph. R. 534; McNaughten *v.* Patridge, 11 Ohio Rep. 223; McDonald *v.*

be purely technical; and has its origin in the general doctrine of agency at the common law; where it is held, that an agent or attorney cannot execute a deed or sealed instrument, in the name of his principal, so as to bind him thereby, as the proper party thereto, unless the authority is conferred upon him by an instrument of equal dignity and solemnity, that is by one under seal.[1] And yet the common law does not seem in all cases to follow out its own principle; for it is not required to execute any instrument or writing, not under seal, that the authority to an agent, or attorney, or partner, should be in writing. It may be by parol, or even be implied from circumstances.[2] Ordinarily, also, the dissolution of a contract is required by the common law to be by an instrument of the same dignity and solemnity, as that by which it is created.[3] *Eodem modo, quo oritur, eodem modo dissolvitur.*[4]

§ 118. The Roman law seems to have acted upon one uniform principle, if not in the formation of contracts, at least in the dissolution of contracts; that is to say, that they might and ought to be dissolved in the same mode, in which they were created. *Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est.*

Eggleston, 26 Vermont, 154; Snyder v. May, 19 Penn. St. R. 235; Henry v. Gates, 26 Misso. 317; Remington v. Cummings, 5 Wisc. 140.

[1] Story on Agency, § 49; Co. Litt. 48, b; Harg. note 2; Harrison v. Jackson, 7 T. R. 203; Paley on Agency, by Lloyd, 157, 158; 2 Kent, Comm. Lect. 41, p. 613, 4th edit.; Id. Lect. 43, p. 47, 48, 4th edit.; Green v. Beales, 2 Caines, R. 254; Clement v. Brush, 3 Johns. Cas. 180; Skinner v. Dayton, 19 Johns. R. 513; Berkeley v. Hardy, 5 B. & Cresw. 355; Gow on Partn. ch. 2, § 2, p. 58, 59, 60, 3d edit.; United States v. Astley, 3 Wash. Cir. R. 508; Ex parte Bosanquet, 1 De Gex, R. 432.

[2] Story on Agency, § 50, 51; Coles v. Trecothick, 9 Ves. 250; 2 Kent, Comm. Lect. 41, p. 613, 614, 4th edit.

[3] Story on Agency, § 49.

[4] Bac. Abridg. *Release*, A.; Neal v. Sheaffield, Cro. Jac. 254.

Ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu dissolvitur.[1] Again: *Prout quidque contractum est, ita et solvi debet; ut cum re contraxerimus, re solvi debet.*[2] And again: *Et cum verbis aliquid contraximus, vel re, vel verbis, obligatio solvi debeat; verbis, veluti cum acceptum promissori fit; re, veluti cum solvit, quod promisit; Æque, cum emptio, vel venditio, vel locatio contracta est; quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest.*[3] But a distinction was taken in the Roman law between mere consensual contracts, and other civil obligations, which resulted from real contracts or stipulations under that law. The former might be discharged by a simple agreement; but to discharge the latter, *pleno jure*, it was necessary for the act to be done by the formality of an acceptilation.[4]

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[1] Dig. Lib. 50, tit. 17, l. 35; Pothier, Oblig. n. 571 to 580.

[2] Dig. Lib. 46, tit. 3, l. 80; Pothier, Pand. Lib. 58, tit. 17, n. 1388.

[3] Dig. Lib. 46, tit. 3, l. 80.

[4] Inst. Lib. 3, tit. 30, § 1, 2. — Pothier has expounded this doctrine in his Treatise on Obligations, n. 571, and says: "According to the principles of the Roman law, there was a difference between civil obligations resulting from consensual contracts, which were contracted by the mere consent of the parties, and other civil obligations, which resulted from real contracts, or from stipulations. With respect to those contracted by the consent of the parties, the release might be made by a simple agreement, by which the creditor agreed with the debtor to hold him acquitted, and such agreement extinguished the obligation *pleno jure.* With respect to other civil obligations, for the release to extinguish the obligation *pleno jure*, it was necessary to have recourse to the formality of an acceptilation, either simple, if the obligation resulted from a stipulation, or Aquilian, if from a real contract. A simple agreement by the creditor to acquit the debtor, did not extinguish such obligations *pleno jure;* but only gave the debtor an exception, or *fin de non reçevoir*, against the action of the creditor, demanding the payment of the debt, contrary to the faith of the agreement. This distinction and these subtilties are not admitted in the law of France, in which we have no such form as an acceptilation; and all debts, of whatever kind, and in whatever manner contracted, are extinguished, *pleno jure*, by a simple agreement of release between the creditor and debtor, provided the creditor is capable

§ 119. Upon the ground of the general principle of the common law, it has been held, that a bond, signed by one partner in the course of the partnership business, without an authority under seal, binds only the partner, who signs and seals it, although it is signed and sealed in the name of the firm.[1] Thus, a bond, given in the name of the firm at the custom-house, for the payment of the duties on goods imported for and belonging to the partnership, will not bind the partnership, but only the partner signing and sealing the same.[2] *A fortiori*, if a deed be made by one partner in

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of disposing of his property, and the debtor is not a person to whom the creditor is prohibited by law from making a donation. Therefore all that is said in the title, ff. de Accept. concerning the form of an acceptilation, and particularly that acceptilation cannot be made under a condition (L. 4, ff. de Acceptil.), has no application in the law of France. With us there is nothing to prevent the creditor making the release of the debt depend upon a condition, and the effect of such a release is to render the debt conditional, the same as if it had been contracted under the opposite condition to that of the release."

[1] In Harrison *v.* Jackson, 7 Term R. 203, 206, Lord Kenyon said: "The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted, but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *nisi prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said, that, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed. But I deny that consequence, just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners." See 3 Kent, Comm. Lect. 43, p. 47, 48, 4th edit.

[2] Metcalf *v.* Rycroft, 6 Maule & Selw. 75; Elliott *v.* Davis, 2 Bos. & Pull. 338; Hawkshaw *v.* Parkins, 2 Swanst. R. 543; Harrison *v.* Jackson,

the name of the firm, conveying away the real estate of the firm, it will be invalid to convey the title of the other partners, since the law requires, that every conveyance of real estate should be by the deed of the party himself, who possesses the title; and another person cannot convey it in his name, except by an authority under seal.

§ 120. This doctrine seems peculiar to the common law; and, as has been suggested, seems mainly founded on technical reasoning. It has, however, been sometimes maintained, as founded in public policy; and that it would be a dangerous power, and enable one partner to give undue preferences to favorite creditors. But this power now exists, as to all personal property and funds of the partnership; and, as an original foundation of the doctrine, seems at once inadequate, and unsatisfactory. Indeed, a strong inclination has been exhibited in our day to get rid of the doctrine, or to qualify and limit it so far, that, practically speaking, it would have little operation and influence. One exception is, that if the deed is executed by one partner in the presence of and with the assent of all the partners, it shall be deemed the deed of all.[1] But, perhaps, this is not so properly an exception, as it is an application of an old rule of the common law, which makes a deed,

7 Term R. 207; Skinner v. Dayton, 19 Johns. R. 513.—To cure this very difficulty, Congress have been compelled to pass an act, providing, that such a bond given and sealed in the name of the firm, or partners, under his seal (see Hawkshaw v. Parkins, 2 Swanst. R. 544), shall be binding on all of them. Act of Congress of 1st March, 1823, ch. 149, § 25.

[1] Ball v. Dunsterville, 4 Term R. 313; Burn v. Burn, 3 Ves. R. 578; Mackay v. Bloodgood, 9 Johns. R. 285; Halsey v. Whitney, 4 Mason, R. 232; Collyer on Partn. B. 3, ch. 2, § 1, p. 308, 309, 310, 2d edit. See Smith v. Winter, 4 Mees. & Welsb. 454. See Hunter v. Parker, 7 Mees. & Welsb. 322.

executed by an agent in the presence of his principal, the deed of the latter, although the authority to do it is merely by parol.[1] The case of a release by one partner, either in his own name, or in that of the firm, of a partnership debt, may also be thought to constitute another exception. But, in fact, it turns, as we shall presently see, upon another distinct consideration, that a release by one joint creditor discharges the action as to both; and such a deed of one partner is clearly operative as to himself.[2]

§ 121. But the main struggle has been, not so much to contest the doctrine of the common law, that an authority to execute a sealed instrument does not flow from the ordinary relation of partnership, as to contest the doctrine, that it requires a prior authority under seal, or a subsequent ratification under seal, to make the execution valid.[3] The old authorities, and indeed the whole current of decisions in England, establish the rigid doctrine in its fullest extent. They assert, that no prior authority, or subsequent ratification, either verbal, or by writing, without seal is sufficient to give validity to the instrument, as the sealed contract of the party.[4] This is reducing the rule itself to its true

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[1] Lord Lovelace's case, W. Jones, R. 268; Story on Agency, § 51; Gow on Partn. ch. 2, § 2, p. 59, 3d edit.

[2] Gow on Partn. ch. 2, § 2, p. 60, 3d edit.; Collyer on Partn. B. 3, ch. 2, § 1, p. 308 to 312, 2d edit.; Cady v. Shepherd, 11 Pick. R. 400; Gram v. Seton, 1 Hall, R. 262; Skinner v. Dayton, 19 Johns. R. 513; Story on Agency, § 49; Ante, § 114; Beckham v. Drake, 9 Mees. & Welsb. R. 19, 91 to 94; Beckham v. Knights, 1 Mann. & Grang. 738; Ante, § 103, note.

[3] 3 Kent, Comm. Lect. 43, p. 47, 48, 4th edit.

[4] Gow on Partn. ch. 2, § 2, p. 58 to 60, 3d edit.; Sleiglitz v. Egginton, Holt's N. P. R. 141, (a); Hunter v. Parker, 7 Mees. & Welsb. R. 342; Wallace v. Kelsall, 7 Mees. & Welsb. R. 264, 272.

technical character, and stripping it of all pretence of being founded in public policy. The American courts have in this view strongly inclined to repudiate it in all cases, where an express, or an implied authority or confirmation could be justly established, not under seal, whether it be verbal, or in writing, or circumstantial.[1]

§ 122. Some of the American decisions may be supported upon the general ground, that the act, if done by an unsealed instrument, would have been within the scope of the business of the partnership, and the powers and authorities belonging to each partner.[2] In such cases there does not seem any solid reason, why the act, when done, should be vitiated by being under the seal and signature of the firm.[3] There seems nothing incongruous in such a case in holding, that it is binding on the individual partner, as his sealed instrument, and on the other partners as their agreement or assignment, made by their authorized agent.[4] Thus, a purchase of

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[1] 3 Kent, Comm. Lect. 43, p. 47, 48, 4th edit.

[2] Tapley *v.* Butterfield, 1 Metc. R. 515.

[3] Purviance *v.* Sutherland, 2 Ohio, St. R. 478; Sweetzer *v.* Mead, 5 Mich. 107.

[4] See Harrison *v.* Sterry, 5 Cranch, 289; Cady *v.* Shepherd, 11 Pick. R. 400.—In Anderson *v.* Tompkins, 1 Brock. Cir. R. 462, Mr. Chief Justice Marshall said: "It is said, this transfer of property is by a deed, and that one partner has no right to bind another by deed. For this a case is cited, which, I believe, has never been questioned in England, or in this country. (Harrison *v.* Jackson et al, 7 Durnf. & East, 207.) I am not, and never have been satisfied with the extent, to which this doctrine has been carried. The particular point decided in it is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. That was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to the decision. No action can be sustained against the

goods, in the course of the trade and business of the partnership, under the seal of the firm, has been held binding on the firm.[1] But the more general doctrine, and indeed, that which is principally relied on, is, that a prior authority, or a subsequent ratification, not under seal, but either express or implied, verbal or written, is sufficient to establish the deed, as the deed of the firm, and binding upon it as such.[2]

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partner, who has not executed the instrument, on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled. But I cannot admit its application in a case, where the property may be transferred by delivery, under a parol contract, where the right of sale is absolute, and the change of property is consummated by delivery. I cannot admit, that a sale, so consummated, is annulled by the circumstance, that it is attested by, or that the trusts under which it is made, are described in a deed. No case goes thus far; and I think such a decision could not be sustained on principle." See also Sale *v.* Dishman's Executors, 3 Leigh, R. 548; Collyer on Partn. B. 3, ch. 2, § 1, p. 313, 2d edit.; S. P. Hunter *v.* Parker, 7 Mees. & Welsb. 322. [In Ex parte Bosanquet, 1 De Gex, R. 439, the Chief Judge in Bankruptcy said: "As to the objection, that the security being effected by a deed executed by one partner could not bind the firm, it might be true that the instrument would not take effect as the deed of the firm; but the transaction itself was one within the authority of the partner, and the circumstance of a deed being executed would not invalidate the contract." See also Everit *v.* Strong, 7 Hill, N. Y. R. 585.]

[1] Cady *v.* Shepherd, 11 Pick. R. 400.

[2] Skinner *v.* Dayton, 19 Johns. R. 512; Cady *v.* Shepherd, 11 Pick. R. 400; Gram *v.* Seton, 1 Hall, R. 262; Herbert *v.* Hanrick, 16 Ala. 581; Smith *v.* Kerr, 3 Comst. 144; McDonald *v.* Eggleston, 26 Vermont, 154; Drumright *v.* Philpot, 16 Geo. 424; Swan *v.* Stedman, 4 Met. 548; Ely *v.* Hair, 16 B. Monroe, 230. The whole reasoning, on which this doctrine depends, as well as the authorities, on which it is founded, were most ably and elaborately reviewed in the case of Cady *v.* Shepherd, 11 Pick. R. 405, 406, and in Gram *v.* Seton, 1 Hall, R. 262. In the latter case especially, all the English, as well as the American authorities, were examined at great length by Mr. Chief Justice Jones, and his judgment is worthy of a most attentive perusal. On that occasion he said: "The principle, that a partner cannot, by virtue of the authority he derives from the relation of copartnership, bind his copartner by deed, has been too long settled to be now shaken. It is the

§ 122 *a*. In the next place, although one partner may procure advances of money to carry on the business of

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technical rule of the common law applicable to deeds, which has been ingrafted into the commercial system of the law of partnership; and unless the charter-party in question can, under the circumstances of this case, be construed to be the deed of Bunker, the defence must prevail. The reasons for the restrictions are not very satisfactory; for all the mischiefs, which the expositors of the rule ascribe to the authority of members of a copartnership to seal for their copartners, may flow almost as extensively, and nearly with equal facility, from the use of the name and signature of the copartnership. The dangers of allowing the use of a seal to the members of a copartnership are supposed to consist in these two attributes of the seal; that it imports a consideration, and that it is competent to convey absolutely, or to charge and encumber real estate. But negotiable paper, by which the partner may bind the firm, equally imports a consideration with a seal; and upon general principles, the use of the seal of the copartner, equally with the signature of the copartnership, would, if permitted, be restricted to copartnership purposes and copartnership operations solely; and the joint deed of the copartners, executed by the present for the absent members, be held competent to convey or to encumber the copartnership property alone, and to have no operation upon the private funds or separate estate of the copartners. With these restrictions upon the use and operation of the seal, is not the power of a partner to bind his copartner, and to charge and encumber his estate, as great and as mischievous, without the authority to use the seal of the absent partner, as it would be with that authority? Those powers undeniably place the fortune of the members of a general copartnership, to a great degree at the disposal of any one of the copartners; but it is necessary to the beneficial management of the joint concern, that extensive powers should be vested in the members, who compose it; and when the copartners live remotely from each other, their joint business concerns cannot be advantageously conducted or carried on, without a latitude of authority in each, which is inconsistent with the perfect safety of the other copartners. It cripples the operation of a partner, whose distant residence precludes a personal cooperation, to deny him the use of the seal of his copartner for instruments requiring it, and which the exigencies of their joint concerns render expedient or beneficial to them. He must be clothed with the power to execute deeds for his copartner when necessarily required for the purposes of the trade; and if that authority is not inherent in the copartnership, it must be conferred by letter of attorney, and it must be general, or it will be inadequate to the ends of its creation. A copartnership, especially, which is employed in foreign trade, and has occasion to employ ships for the transportation of merchandise, or to borrow money on *respondentia*, if its members are dispersed, as is often the case, must be seriously embarrassed in its operations

an established partnership, and thereby bind the firm; yet if the partnership is not established, one partner has not an implied authority to bind the firm for advances in the incipient state thereof to raise capital therefor.[1]

§ 123. These seem to be the principal exceptions to the authority of one partner to bind the partnership by his own acts and contracts, done within the scope of partnership trade and business, and for the purposes

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by the application of the rule, that requires every copartner, who is to be bound by the charter-party or the *respondentia* bond, to seal it personally, or by attorney duly constituted for that specific purpose, with his own seal. Similar difficulties would arise out of the same rule, when the operations of the house required the copartnership to execute other deeds. Can it then be, that this stern rule of the common law, which has its appropriate sphere of action, and a most salutary operation on those relations of society, where men, not otherwise connected, are the owners of undivided property, is to be applied in all its force, and to govern, with unbending severity, in the concerns of copartners, whose intimate connection and mutual interest require such large power and ample confidence in the integrity and prudence of each other, to give to their operations efficiency, vigor, and success? The pressure of these considerations has induced a relaxation of the common-law rule, to adapt it to the exigencies of commercial copartnerships, and other associations of individuals, operating with joint funds for the common benefit. The rule itself remains; but the restrictions it imposes are qualified by the application of other principles. The general authority of a partner, for example, derived from his relation to his copartners, does not empower him to seal an instrument for them, so as to make it binding upon them without their assent, and against their will. This is the fair import of the modern cases, and is, I apprehend, the principle courts are disposed to apply to the use of a seal in joint contracts for copartnership purposes. An absent partner is not bound by a deed executed for him by his copartner, without his previous authority or permission, or his subsequent assent and adoption. But the previous authority or permission of one partner to another to seal for him, or his subsequent adoption of the seal as his own, will impart efficacy to the instrument as his deed; and that previous authority or subsequent adoption may be by parol. These are the results, which I deduced from the judicial decisions, especially those of our own courts, on the subject; and if I am correct in my deduction, the conclusion must be favorable to the validity of this charter-party, as the deed of both the partners."

[1] Fisher *v.* Taylor, 2 Hare, R. 218, 229.

thereof. But another question may arise; and that is, whether in cases of partnership the majority is to govern in case of a diversity of opinion between the partners, as to the partnership business and the conduct thereof; or, whether one partner can, by his dissent, arrest the partnership business, or suspend the ordinary powers and authorities of the other partners in relation thereto, against the will of the majority. Where there is no stipulation in the partnership articles to control or vary the result (for if there be any stipulation, that ought to govern),[1] the general rule would seem to be, that each partner has an equal voice, however unequal the shares of the respective partners may be, because in such a case, each partner has a right to an equal share of the profits;[2] and the majority, acting fairly and *bonâ fide*, have the right and authority to conduct the partnership business, within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the minority.[3] Where there are but two

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[1] Const *v.* Harris, Turn. & Russ. R. 496, 517, 518, 521; 3 Kent, Comm. Lect. 43, p. 45, 4th edit.

[2] See Ante, § 24.

[3] Collyer on Partn. B. 2, ch. 2, § 1, p. 129, 130; Id. B. 3, ch. 1, § 262, 2d edit.; 3 Chitty on Commerce and Manuf. ch. 4, p. 236; Const *v.* Harris, Turn. & Russ. R. 496, 517, 518, 524, 525; Kirk *v.* Hodgson, 3 Johns. Ch. R. 400, 405, 406; Johnston *v.* Dutton, 27 Ala. 245. — It is not easy to say, that this doctrine is so entirely settled, as to admit of no controversy. The elementary writers are not all agreed about it; and the dicta of Judges do not always admit its correctness. Still it appears to me, that the text states the true doctrine, fairly deducible from a just survey of all the leading authorities. On one occasion, Lord Eldon said: "If I consider them (a lodge of freemasons) as individuals, the majority had no right to bind the minority." Lloyd *v.* Loaring, 6 Ves. 777. But that was not a case strictly of partnership; but rather of a club. Mr. Watson, in his Treatise on Partnership (ch. 4, p. 194, 2d edit.), says: "We have seen in ——— *v.* Layfield, Lord Holt held, that the act of one partner should be presumed the act of the others, and should bind them, unless they could show a disclaimer. And it would

persons in the firm, and they dissent from each other, it would seem a just result, that it amounts to a temporary suspension of the right and authority of each to

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seem, that even during the subsistence of the partnership, and in the established course of trade, one partner may to a certain degree limit his responsibility. If there be any particular speculation or bargain proposed, which he disapproves of, by giving distinct notice to those, with whom his copartners are about to contract, that he will not in any manner be concerned in it, they could not have recourse upon him; as proof of this notice would rebut his *primâ facie* liability. The partnership in that case might either be considered as dissolved, or *quoad hoc* as suspended. Where three persons entered into partnership in the trade of sugar-boiling, and agreed, that no sugars should be bought without the consent of the majority; one of them afterwards makes a protest, that he would no longer be concerned in partnership with them. The other two persons after make a contract for sugars, the seller having notice, that the third had disclaimed the partnership, he shall not be charged." The case in Salkeld, 292, will not be found to justify the broad conclusion of the author. It was there held, that partners would be presumed to have assented to a transaction designed for their benefit, unless they had refused to be concerned in it. The case in 16 Vin. Abridg. 244, A. pl. 12, is, indeed, directly in point. But the same case is reported under the name of Minnet *v.* Whinnery, 3 Bro. Parl. Rep. 523 (5 Bro. Parl. Cas. by Tomlins, 489), where it appears, that the case turned upon very different considerations, and facts establishing an exclusive credit to the other partners, contracting the debt, and that there had been a dissolution of the partnership at the time. See Collyer on Partn. B. 3, ch. 1, p. 261, 2d edit. In the case of Vice *v.* Fleming, 1 Younge & Jerv. 227, 230, Mr. Chief Baron Alexander said: "It is clear that the defendant might, by an absolute notice, have discharged himself from all future liability, whether he ceased or continued to be a partner." Mr. Baron Garrow added: "All the partners of a firm are liable for the debts of the firm; but this responsibility may be limited by express notice by one, that he will not be liable for the acts of his copartners." It does not seem to me, that the facts of that case required so strong a statement, or that the point was positively in judgment. The case of Willis *v.* Dyson, 1 Starkie, R. 164, is not in point; for there were but two partners, and they dissented in opinion, and notice was given by one. In Lord Galway *v.* Mathew, 1 Camp. R. 403, s. c. 10 East, R. 264, a majority of the partners did not concur in giving the note. See Rooth *v.* Quin, 7 Price, R. 193; 3 Kent, Comm. Lect. 43, p. 45, 4th edit.; Collyer on Partn. B. 2, ch. 2, § 2, p. 129, 130, 2d edit.; Gow on Partn. ch. 2, § 2, p. 52, 3d edit., and note, ibid. of American Editor (Mr. Ingraham); Id. ch. 4, § 1, p. 149.

carry on or manage the partnership business, or dispose of the partnership property, in respect to all persons having notice of such disagreement.[1] But in every case, where the decision of the majority is to govern, it would seem reasonable, that the minority, if practicable, should have notice thereof and be consulted; and if the majority should choose wantonly to act without information to, or consultation with the minority, it would hardly be deemed a *bonâ fide* transaction, obligatory upon the latter.[2]

§ 124. The Roman law seems to have adopted the general rule, that no act was binding upon all the partners, unless so far as it was expressly or impliedly agreed to by all; and consequently the refusal or prohibition of one rendered the act a nullity, as to himself. In this respect, the partner prohibiting was held to have a superior right against the others. *In re communi neminem dominorum jure facere quicquam, invito altero, posse. Unde manifestum est prohibendi jus esse;*

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[1] Willis *v.* Dyson, 1 Stark. R. 164.

[2] Const *v.* Harris, Turn. & Russ. R. 496, 525, 527.—In this case Lord Eldon said: "I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*, meeting not for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority to say, We do not care what one partner may say, we being the majority, will do what we please, is, I apprehend, what this court will not allow." Again: "In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded. What weight is to be given to it is another question. The most prominent point, on which the court acts, in appointing a receiver of a partnership concern, is, the circumstances of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership, as he, who assumes that power, himself enjoys."

in re enim pari potiorem causam esse prohibentis constat. Sed etsi in communi prohiberi socius a socio, ne quid faciat, potest, ut tamen factum opus tollat, ut cogi non potest, si cum prohibere poterat, prætermisit.[1] The French law has adopted the same doctrine, in the absence of all counter stipulations of the parties.[2] But if the administration of the partnership be confided to one or more of the partners, the others cannot recall that authority, or annul or prohibit its exercise during the existence of the partnership, or the presumed duration of the authority.[3] Such also is the rule of the Scottish law;[4] and of the Louisiana Code.[5]

§ 125. The doctrine of the common law above stated, as to the right of the majority to govern in all cases, where the stipulations of the articles of the partnership do not import the contrary, must be strictly confined to acts done within the scope of the business of the partnership, and does not extend to the right to change any of the articles thereof. In such a change, it is essential that all should unite; otherwise it is not obligatory upon them. [Thus, if written articles of partnership stipulate that there shall be no trade in spirituous liquors, and they be so changed by the majority as to allow such trade, this is a material alteration, at least when such trade is contrary to law, and will justify the minority in withdrawing from the firm.[6]] This is emphatically true in case of joint associa-

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1 Dig. Lib. 10, tit. 2, l. 28; Pothier, Pand. Lib. 17, tit. 2, n. 27; 1 Domat, B. 1, tit. 3, § 4, art. 22.

2 Pothier, De Societé, n. 87 to 91.

3 Pothier, De Societé, n. 71, 90.

4 1 Stair, Inst. tit. 16, § 4, p. 157.

5 Code of Louisiana, art. 2838, 2839, 2841.

6 Abbot v. Johnson, 32 N. H. R. 9.

tions, and joint-stock companies of an extensive nature, in the constitution of which certain articles are treated as fundamental, and cannot be altered or varied without the consent of all the members; for the rule, which applies to public bodies, strictly so called, that the majority is to govern in all cases, is inapplicable to private associations, where the terms originally prescribed for the association, must and ought to remain in full force, until abrogated by the consent of all the associates.[1]

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[1] Livingston *v.* Lynch, 4 Johns. Ch. R. 573, 597.—In this case Mr. Chancellor Kent said: "Lord Coke (Co. Litt. 181, b.) took the distinction between public and private associations, and admitted, that in matters of public concern, the voice of the majority should govern, because it was for the public good, and the power was to be more favorably expounded than when it was created for private purposes. In Viner (tit. *Authority*, B.), we have several cases marking the same distinction; and it is now well settled, that in matters of mere private confidence, or personal trust or benefit, the majority cannot conclude the minority. But where the power is of a public or general nature, the voice of the majority will control, on grounds of public convenience; and this is also part of the law of corporations." (Attorney-General *v.* Davy, 2 Atk. 212; The King *v.* Beeston, 3 Term Rep. 592; Withnell *v.* Gartham, 6 Term Rep. 388; Grindley *v.* Barker, 1 Bos. & Pull. 229; Green *v.* Miller, 6 Johns. R. 39; 5 Co. 63, a.) In Lloyd *v.* Loaring (6 Ves. 773), there was a suit by three persons, on behalf of themselves and all the other members of a lodge of freemasons; and Lord Eldon observed, "that if he considered them as individuals, the majority had no right to bind the minority. One individual has as good a right to possess the property as any other, unless he can be affected by some agreement." Mr. Abbott (Law of Shipping, Part 1, ch. 3, § 2) admits the extreme inconvenience, under the law of England, of enjoying personal chattels vested in several distinct proprietors, without a common consent and agreement among them. But the case most applicable to the one before us, is that of Davies *v.* Hawkins (3 Maule & Selw. 488). A company was formed for brewing ale, and by deed they confided the conduct of the business to two persons, who were to be trustees of the company. General quarterly meetings of the company were to be held. It was resolved by the K. B., that one person only could not be appointed at a general quarterly meeting, in place of the

two originally appointed under the deed, unless such alteration was made by the consent of all the subscribers. Lord Ellenborough said, that 'a change had been made in the constitution of this company, which could not be made without the consent of the whole body of the subscribers. It was such a substituted alteration in its constitution, as required the assent of all.'"

CHAPTER VIII.

LIABILITIES AND EXEMPTIONS OF PARTNERS AS TO THIRD PERSONS.

§ 126. There are certain powers and authorities, which from long usage and recognition are so generally attached to all sorts of partnerships, that they will be deemed to exist by presumption of law (*presumptione juris et de jure*), unless there is clear evidence to repel the presumption, or some positive contrary stipulation be agreed upon between the parties. Thus, for example, each partner may, as we have seen, buy and sell goods, belonging to or for the use of the partnership or the ordinary business thereof;[1] each partner may pledge the partnership property, or borrow money for partnership purposes, on the credit of the firm.[2] These cases are sufficiently clear from what has been already suggested in a former section.[3] But the same doctrine

[1] Collyer on Partn. B. 3, ch. 1, § 1, p. 263, 264, 265, 267, 2d edit.; Hyatt *v.* Hare, Comb. R. 383; Thicknesse *v.* Bromilow, 2 Cromp. & Jerv. 431; Ante, § 102; Livingston *v.* Roosevelt, 4 Johns. R. 251; United States Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters R. 259.

[2] Collyer on Partn. B. 3, ch. 1, § 1, p. 263, 267; Id. 290, 291, 2d edit.; Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 Cromp. & Jerv. 431; Bank of U. States *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Fox *v.* Hanbury, Cowp. R. 445; Raba *v.* Ryland, Gow, R. 132; Tupper *v.* Haythorn, Gow, R. 135; Reid *v.* Hollinshead, 4 B. & Cresw. 867; Church *v.* Sparrow, 5 Wend. R. 223; Livingston *v.* Roosevelt, 4 Johns. R. 251, 265; 2 Bell, Comm. B. 7, p. 615, 616, 5th edit.; 3 Kent, Comm. Lect. 43 to 46, 4th edit.; Gow on Partn. ch. 2, § 2, p. 36 to 56, 3d edit.; Watson on Partn. ch. 4, p. 195; United States Bank *v.* Binney, 5 Mason, R. 156 s. c. 5 Peters, R. 529.

[3] Ante, § 102.

cannot be as universally affirmed, as to the right to draw, or indorse, or accept, or negotiate bills of exchange, or to make, or indorse promissory notes, not being the securities of third persons, held by the firm, as a part of the funds thereof, and therefore disposable accordingly. For although, in the ordinary course of commercial partnerships, these are known and universally acknowledged operations, which any partner is competent to transact, because they arise from the usages of trade, and the previous consent of all the partners, and from this universality in practice, they are now adopted as a general rule of law;[1] yet it by no means follows, that the like rule prevails in all other sorts of partnership, or in such as are of a special and peculiar nature.[2] The foundation of any general and known usage may here altogether fail, and the very nature, or organization, or objects of the partnership may show, that it is neither a proper nor a necessary power to be exercised by a partner.[3] Thus, if a partnership is organized for mining, or for farming purposes, the directors or active agents thereof will not, as incident thereto, possess a power to draw or accept bills, or to draw or indorse notes for the company. But there

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[1] Collyer on Partn. B. 3, ch. 1, § 2, p. 268 to p. 279, 2d edit.; Thicknesse v. Bromilow, 2 Cromp. & Jerv. 485; U. States Bank v. Binney, 5 Mason, R. 176, 184; s. c. 5 Peters, R. 529; Livingston v. Roosevelt, 4 Johns. R. 251; Swan v. Steele, 7 East, R. 210; Gow on Partn. ch. 2, § 2, p. 38 to p. 50, 3d edit.; Le Roy v. Johnson, 2 Peters, R. 186; Harrison v. Jackson, 7 Term R. 203, 206.

[2] Dickinson v. Valpy, 10 B. & Cresw. 128; Thicknesse v. Bromilow, 2 Cromp. & Jerv. 425, 430. [But this rule was extended to banking partnerships, in Bank of Australasia v. Briellat, 6 Moore, P. C. 152, where the language of the text is cited with approbation.]

[3] Collyer on Partn. B. 3, ch. 2, § 2, p. 329, 330, 2d edit.; Gow on Partn. ch. 4, § 1, p. 149, 150, 3d edit.

should be some proof, that an express authority is given for this purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof.[1]

§ 127. The like observations apply with increased force to cases of guaranty.[2] If one partner gives a letter of credit or guaranty in the name of the partnership, it is not to be treated, as of course binding on

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[1] Collyer on Partn. B. 3, ch. 1, § 2, p. 269, 2d edit.; Dickinson *v.* Valpy, 10 B. & Cresw. 128; Mullett *v.* Hutchison, 7 B. & Cresw. 639; Thicknesse *v.* Bromilow, 2 Cromp. & Jerv. 435; Greenslade *v.* Dower, 7 Barn. & Cresw. 635. [In Ricketts *v.* Bennett, 4 Mann., Granger & Scott, 686, it was held that one of several co-adventurers in a mine, has not, *as such*, any authority to pledge the credit of the general body for money borrowed for the concern. And the fact that he had the *general management* of the mine, makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. See also Tredwen *v.* Bourne, 6 M. & W. 461; Hawtayne *v.* Bourne, 7 M. & W. 595; Hawken *v.* Bourne, 8 M. & W. 703.] Pothier has put several cases illustrative of an analogous doctrine, in cases of partnerships not commercial. Pothier, de Societé, 102, 103, 104. Mr. Chancellor Kent has well summed up the doctrine in his Commentaries (3 Kent, Comm. Lect. 43, p. 46, 4th edit.). He says: "It was formerly understood, that one partner might bind his copartners by a guaranty, or letter of credit, in the name of the firm; and Lord Eldon, in the case of Ex parte Gordon, considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, both in England and in this country, that one partner is not authorized to bind the partnership by a guaranty of the debt of a third person, without a special authority for that purpose, or one to be implied from the previous course of dealing between the parties, unless the guaranty be afterwards adopted and acted upon by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and then it will be obligatory upon the company, and this is the principle on which the distinction rests. The same general rule applies, when one partner gives the copartnership as a mere and avowed surety for another, without the authority or consent of the firm; for this would be pledging the partnership responsibility, in a matter entirely unconnected with the partnership business."

[2] 2 Bell, Comm. B. 7, p. 618, 5th edit.; 3 Kent, Comm. Lect. 43, p. 46, 4th edit.

the partnership; for it is not a natural or necessary incident in all sorts of partnerships, for one partner to possess the power to bind his copartners by a guaranty.[1] It must be shown to be justified, either by the usages of the particular trade or business, or by the known habits of the particular partnership, or by the express or implied approbation of all the partners in the given case.[2] The same rule will apply to cases, where one

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[1] Sweetser *v.* French, 2 Cush. 309; Andrews *v.* Planter's Bank, 7 Smedes & Marshall, 192; Langan *v.* Hewit, 13 Id. 122; Tutt *v.* Addams, 24 Misso. 186.

[2] Duncan *v.* Lowndes, 3 Camp. R. 478; Sandilands *v.* Marsh, 2 B. & Ald. 679: Payne *v.* Wood, 3 Dowl. & Ryl. 664; Ex parte, Nolte, 2 Glyn & Jam. 306; Collyer on Partn. B. 3, ch. 1, § 3, p. 279 to 281, 2d edit.; Crawford *v.* Stirling, 4 Esp. R. 207; Theobald on Prin. and Surety, 29, 30, 31; 2 Bell, Com. B. 7, ch. 1, p. 618, 5th edit.; 3 Kent, Comm. Lect. 43, p. 46, 47, 4th edit.; Sutton *v.* Irving, 12 Serg. & Rawle, 13; Hamil *v.* Purvis, 2 Pennsyl. R. 177; Gow on Partn. ch. 2, § 2, p. 37, 38, 56, 57, 58; Id. ch. 4, § 1, p. 148, 149, 3d edit.; Dob *v.* Halsey, 16 Johns. R. 38; Rollins *v.* Stevens, 31 Maine, 454; Foot *v.* Sabin, 19 Johns. R. 154; New York Fire Insurance Co. *v.* Bennett, 5 Connect. R. 574. There is some apparent discrepancy in the authorities. But the text contains what seems to me the just results belonging to the doctrine; and it is accordingly adopted by Mr. Chancellor Kent in his Commentaries. (3 Kent, Comm. Lect. 43, p. 46, 47, 4th edit.) In Hope *v.* Cust, cited by Mr. Justice Lawrence in Shirreff *v.* Wilks, 1 East, R. 52, 53, Lord Mansfield is reported to have said: "There is no doubt but that the act of every single partner in a transaction relating to the partnership, binds all others. If one gives a letter of credit or guaranty in the name of all the partners, it binds all." Lord Mansfield was here addressing himself to the case of bankers, when it might perhaps be within the ordinary scope of their business. On the other hand, Lord Ellenborough, in Duncan *v.* Lowndes (3 Camp. R. 478), in the case of a commercial partnership, said: "As it is not usual for merchants in the common course of business to give collateral engagements of this sort, I think you must prove that Lowndes had authority from Bateson to sign the partnership firm to the guaranty in question. It is not incidental to the general power of a partner to bind his copartners by such an instrument. This case was not, however, a guaranty in the partnership business, but a guaranty of the acceptances of a third person, not belonging to the partnership funds. In Sandilands *v.* Marsh (2 Barn. & Cresw. 673), a guaranty of an annuity by

partner signs or indorses the name of a firm to a note, as surety for a third person, in which note the partnership has no interest, and where it is not in the course of their business.[1] [The authority however may be proved by circumstances.[2]]

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one partner, the partnership not dealing in annuities, but the dealing in this annuity being known to the other partner, and not disapproved of by him, and he having no knowledge of the guaranty, was held to bind the partnership, upon the ground that the transaction as to the annuity, being adopted as a part of the business binding on the partnership, the whole transaction bound the partnership, although the guaranty was not known. This must have been sustained upon the notion, that dealers in annuities, in the ordinary course of things, were accustomed to guaranty them; for the mere adoption of an act of one partner, where there was a concealment of material circumstances, might not bind him, if the business were not within the scope of their ordinary business."

[1] Laverty *v.* Burr, 1 Wend. R. 529, 531; Bank of Rochester *v.* Bowen, 7 Wend. R. 158; Wilson *v.* Williams, 14 Wend. 146; Catskill Bank *v.* Still, 15 Wend. R. 364; Rollins *v.* Stevens, 31 Maine, 354. The American cases are very generally agreed on this point. In Laverty *v.* Burr, 1 Wend. 529, 531, Mr. Justice Sutherland, in delivering the opinion of the court, said: "Hosmer, the agent of the plaintiffs, took the note in question for a debt due from Allen, the maker, to them. He refused to take Allen's note without security. The security given was the indorsement of Burr and Baldwin, the defendants, and of Smith and Jenkins, the second indorsers. The plaintiffs, therefore, knew, when they took the note, that the indorsement of the defendant was made by one of the partners, in the name of the firm, as security for Allen, and not for a debt due from the firm. The partner, who did not sign the note, is not bound by it under such circumstances, unless he was previously consulted, and assented to the transaction; and the burden of proving, that the partner, who did not sign the note, consented to be bound, is thrown on the creditor. (Dob *v.* Halsey, 16 Johns. R. 38, and Foot *v.* Sabin, 19 Johns. R. 157.) In England, the assent of all the partners is presumed, and the burden of avoiding the security is thrown on the firm, and they are required to prove, that the note was signed by one of the partners on his individual account, without the knowledge and against the consent of the others, and that the creditor knew that fact, when he took the paper of the firm. Here the *onus probandi* is thrown on the creditor. The law upon this subject is very fully considered and clearly established

[2] Butler *v.* Stocking, 4 Selden, 408.

§ 128. In the next place, every contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge, or notice, that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm. For every such contract, made with such knowledge or notice, will be void as to the firm, however binding it may be upon the individual partner making it.[1] This is a natural result of the principles of justice and equity applied to every other contract, as well as to that of partnership contract. It also follows from the known limitations of the law of agency; for no agent can bind his principal in any transaction, in which he knowingly exceeds his authority, or knowingly colludes with another person, having

in the cases referred to, and also in Livingston *v.* Hastie & Patrick (2 Caines, 246), Lansing *v.* Gaine & Ten Eyck (2 Johns. R. 300), and Livingston *v.* Roosevelt (4 Johns. R. 351). The only distinction between this case and that of Foot *v.* Sabin (19 Johns. R. 157), is this. In that case the note was signed by one of the partners in the name of the firm as sureties; here it was indorsed; and it was urged upon the argument of this cause, that in every general partnership, each member necessarily possesses the power of signing or indorsing negotiable commercial paper in the customary way of business, though the power of pledging the firm as sureties for third persons may not exist. The form of the transaction cannot be material, except by way of evidence. When paper is signed by one partner in the name of the firm, as sureties for a third, it carries on the face of it evidence that it was not given for a partnership debt, and proof of that fact becomes unnecessary. But when it is signed or indorsed in the ordinary manner, such proof must be given. But when the fact is established, that it was not given for a partnership debt, and that the person to whom it was passed knew it, no matter what the form of the instrument is, it does not bind the partners, who did not sign or assent to it. In this case, the assent of Baldwin is not shown, and he is therefore entitled to judgment."

[1] See Stainer *v.* Tyson, 3 Hill, R. 279.

notice, in any violation of the rights of his principal.[1] [Thus, if a person seeking to enforce a contract for goods sold a firm upon the negotiation of one partner, knew that such partner was not authorized by the articles of copartnership to purchase goods for the firm, the other partners are not liable therefor.[2]]

§ 129. The same principles are incorporated into the foreign law, of the modern nations of Europe, in respect to partnership. Thus, Pothier says, that in cases of partnership, the signature of the firm by one partner will not oblige the partnership, if it appears from the very nature of the contract, that it does not concern the business of the partnership.[3] So, Mr. Bell asserts the like principles to belong to the Scottish law. When (says he) the party has notice of a stipulated restraint on the power of the partners; or when, by the circumstances, or in its own nature, the transaction is such, as to carry evidence with it of a misapplication of the firm to what is an individual concern only, and not a matter in which the company is interested, the company and the other partners will not be bound.[4]

§ 130. This doctrine may be illustrated in various ways; but the same principle pervades the whole of the cases. Thus, if a person should trust a firm, with a full knowledge that one partner had withdrawn from it, or that the firm was dissolved, or that the other part-

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[1] Story on Agency, § 125, 165; 3 Kent, Comm. Lect. 43, p. 44, 45, 46, 4th edit.; Gow on Partn. ch. 2, § 2, p. 42; Id. p. 49 to 56, 3d edit.; Collyer on Partn. B. 3, ch. 1, p. 261, 2d edit.

[2] Hastings v. Hopkinson, 28 Verm. 108.

[3] Pothier on Oblig. n. 83; Pothier De Société, n. 101.

[4] 2 Bell, Comm. B. 7, p. 616, 5th edit.

ners disavowed or repudiated any such transaction; in each of these cases he would have no remedy against any of the partners, except the one with whom he had entered into the contract.[1] So, also, if the creditor should have notice of any private arrangement between the partners, by which the power of one part-

[1] Minnet *v.* Whinnery, or Whitney, 5 Bro. Parl. Cas. by Tomlins, 489; s. c. 16 Vin. Abridg. 244; s. c. 2 Bro. Parl. Cas. 323; Le Roy *v.* Johnson, 2 Peters, R. 186; Gow on Partn. ch. 2, § 2, p. 48, 49, 3d edit.; Collyer on Partn. B. 3, ch. 1, p. 262, 2d edit.; Willis *v.* Dyson, 1 Stark, R. 164; Alderson *v.* Pope, 1 Camp. R. 404, note; Gow on Partn. ch. 2, § 2, p. 55, 56, 57, 2d edit.; Id. ch. 4, § 1, p. 148 to 150.—Mr. Gow (on Partn. ch. 2, p. 48, 49, 3d edit.) has stated the whole doctrine very clearly and distinctly. "On the subject" (says he) "of negotiable instruments, it remains to be observed, that even in transactions, in which all the partners are interested, the authority of one partner to make, draw, accept, or indorse promissory notes or bills of exchange in the joint name is only implied, and may therefore be rebutted by express previous notice, to the party taking a joint security from one partner, of his want of authority, or that the others will not be liable upon it. Such a power is not indispensably essential to the existence of a partnership; the partners may stipulate between themselves that it shall not be exercised; and if a third person, apprised of such stipulation, will take a joint security, he cannot sue the firm upon it, although it were truly represented to him, by the partner giving the security, that the money to be advanced on it was required for the purpose of, and was in fact applied in liquidating the partnership debts; much less can he hold the firm responsible on a security so obtained, if he take it in defiance of a positive notice, previously given by one of the members, that he will not be answerable for any bill or note signed and negotiated by the others. And the power of one partner to bind the firm by a negotiable security, where it is capable of being exercised, is only coëxistent with the duration of the partnership itself; for, immediately on its dissolution, the power ceases." But although a partner has withdrawn from a partnership, and it is known to the other party, yet if his name is still to continue in the firm for a limited period, that will create a liability on his part as a partner for that period, since he thereby holds himself out to the world, as responsible for their engagements for that period, notwithstanding the dissolution of the partnership. Brown *v.* Leonard, 2 Chitty, R. 120.

ner to bind the firm, or his liability on the partnership contracts is qualified, restricted, or defeated; the creditor would be bound by such arrangement, and could not enforce any right in contravention thereof.[1] The cases have gone yet further; and it has been held, that where a note has been made or indorsed by a partner, in violation of his duty and authority, if the holder, who receives it, has been guilty of gross negli-

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[1] Collyer on Partn. B. 3, ch. 1, p. 261; Id. p. 329, 2d edit.; Minnet *v.* Whinnery, 2 Bro. Parl. R. 323; s. c. 5 Bro. Parl. R. by Tomlins, 489; Ex parte Harris, 1 Madd. R. 583; Bignold *v.* Waterhouse, 1 Maule & Selw. 259; Gow on Partn. ch. 2, § 2, p. 54, 55, 56, 3d edit.; Id. ch. 4, § 1, p. 149 to 151. — In Lord Galway *v.* Mathew, 10 East, R. 264, Lord Ellenborough said: "The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority; and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves, that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others." Mr. Gow, speaking on this subject, says: "So if the person, with whom the single partner deals, is at the time conscious of the misconduct of that partner in pledging the joint name to a separate transaction, he cannot enforce against the firm any claim that may arise to him out of such dealings. Neither can he call upon the firm to fulfil a contract which has been made by one partner, if he be privy to a private agreement between the partners themselves, the effect of which is to throw the responsibility upon the single partner alone. Therefore, where four persons are partners in a coach concern, but one by agreement provides the coaches at a certain rate per mile, he alone is responsible for repairs done to the coach by a person cognizant of this arrangement, although the names of all four appear on the vehicle. So, if it be notorious, that the proprietors have separate departments and interests, they must be sued separately by the tradesmen, who may supply each with goods."

gence in receiving it, it will not be binding in his hands upon the partnership.[1]

§ 131. The same doctrine applies, *à fortiori*, to cases of fraud; for, although in cases of partnership, a fraud committed by one partner in the course of the partnership business and transactions, without the knowledge of the other partners, will bind the firm, and create a liability coextensive therewith;[2] yet it would be absurd to apply this principle to any cases, where the fraud is known to, or participated in, or connived at by, the third person, whose interest it affected; for that would be to allow him to take advantage of his own wrong, and would affect the innocent with the grossest injustice. Thus, for example, if one partner should make a negotiable security in the name of the partnership, and dispose of it to a third person, who knew that the proceeds were to be applied in fraud of the firm, or for purposes not within the scope of their business, or for illegal purposes, it would not be binding on the firm. *A fortiori*, if the whole transaction should be a meditated fraud to accomplish a mere gaming purpose, or some other illegal purpose, between the very parties, the same rule would apply.[3]

§ 132. Similar principles will apply, although not always to the same extent, or with the same certainty, where one partner misapplies the funds, or securities, or other effects of the partnership in discharge or pay-

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[1] Lloyd *v.* Freshfield, 2 Carr. & Payne, R. 325; New York Fire Ins. Co. *v.* Bennet, 5 Conn. R. 574.

[2] Ante, § 108; Collyer on Partn. B. 3, ch. 1, § 5, p. 293 to 304, 2d edit.; Gow on Partn. ch. 2, § 2, p. 55, 3d edit.; Id. ch. 4, § 1, p. 146, 147, 148.

[3] Collyer on Partn. B. 3, ch. 1, § 5, p. 293 to 303, 2d edit.; Gow on Partn. ch. 2, § 2, p. 55, 56, 3d edit.; Id. ch. 4, § 1, p. 147 to 151; Sandilands *v.* Marsh, 2 Barn. & Ald. 673.

ment of his own private debts, claims, or contracts. In such cases the creditor, dealing with the partner, and knowing the circumstances, will be deemed to act *malâ fide*, and in fraud of the partnership, and the transaction, by which the funds, securities, and other effects of the partnership have been so obtained, will be treated as a nullity.[1] The same rule will ordinarily apply to the case of a note, or indorsement, or acceptance, given by one partner in the name of the firm for his own separate debt or contract; for it is a clear misapplication of the partnership credit.[2] So, a re-

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[1] Gow on Partn. ch. 2, § 2, p. 42 to 48, 3d edit.; 3 Kent, Comm. Lect. 43, p. 42, 43, 4th edit.; Ex parte Agace, 2 Cox, R. 312; Collyer on Partn. B. 3, ch. 2, § 3, p. 331 to 347, 2d edit.; Hope *v.* Cust, cited 1 East, R. 53; Arden *v.* Sharpe, 2 Esp. R. 524; Shirreff *v.* Wilks, 1 East, R. 48; Kemys *v.* Richards, 11 Barbour, 312; Green *v.* Deakin, 2 Stark, R. 347; Ex parte Goulding, 2 Glyn & Jam. 118; Snaith *v.* Burridge, 4 Taunt. R. 684; Rogers *v.* Batchelor, 12 Peters, R. 221; Ex parte Bushell, 3 Montagu, Deacon & De Gex, R. 615; Burwell *v.* Springfield, 15 Ala. 273.

[2] Gow on Partn. ch. 2, § 2, p. 44 to 48, 3d edit.; Collyer on Partn. B. 3, ch. 2, § 3, p. 331 to 347, 2d edit.; Watson on Partn. ch. 4, p. 196, 197, 2d edit.; Whitaker *v.* Brown, 11 Wend. R. 75; Gansevoort *v.* Williams, 14 Wend. 133; Wilson *v.* Williams, 14 Wend. R. 146; Dob *v.* Halsey, 16 Johns. R. 34; Lang *v.* Waring, 17 Ala. 145. — In Arden *v.* Sharpe (2 Esp. R. 524, 525), Lord Kenyon said: "The bill is indorsed by one partner in the name of the firm. One partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hand of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable. But the case is different, where the party, who brings the action, was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other. He cannot sue the partnership. The transaction indicates that the money was for that partner's own use, and not raised on the partnership account, therefore he shall not be allowed to resort to the security of the partnership, to whom in the original transaction he neither looked nor trusted." In Livingston *v.* Roosevelt, 4 Johns. R. 251, 265, Mr. Justice Van Ness said: "The distinction between

lease of a partnership debt by one partner (which ordinarily will extinguish the partnership), will be held

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general and special partnerships is probably coeval with their existence. A general rule applicable to both is, that in transactions relating to the joint concern, one of several partners may bind the rest. He may sign notes, indorse or accept bills for the common benefit, &c., without applying to the rest in every particular case. But this authority of a single partner has its limitations. Formerly, as appears by the case of Parkney *v.* Hall (1 Salk. 126, and s. c., 1 Ld. Raym. 175), it was probably less extensive than at this day. One partner of the concern has no authority to pledge the partnership goods for his own debt; nor can he bind the firm to any engagements, known at the time to be unconnected with, and foreign to, the partnership. This has not only been so settled by this court, but now is, and always has been, the established law in England. Not an adjudged case, nor, I believe, a single dictum can be found the other way. This will appear from most of the cases, which I shall presently have occasion to mention for another purpose. In special partnerships, however, this power of the individuals composing them is restricted to still narrower limits, and can only be legally exercised within the compass of that particular business to which the partnership relates. It is as circumscribed as the partnership itself. It is, therefore, analogous to that, which is conferred on an agent appointed for a special purpose, who if he exceed his authority, cannot bind his principal. (Fenn and another *v.* Harrison and others, 3 Term Rep. 757.) This analogy is complete, in all cases, where third persons have dealings with a special partner, with notice that he is such. And, accordingly, it has been repeatedly ruled, that, whenever such a partner pledges the partnership funds, or credit, in a transaction, which is known to be unconnected with, and not fairly and reasonably within, the compass of the partnership, it is, as to the other partners, fradulent and void. They, however, to entitle themselves to the protection of this rule of law, must not do, or consent to, or suffer any thing to be done, which may hold them out to the world as general partners; and it would always be prudent and proper (though I will not say it is indispensably necessary) to give public notice to the community, that the partnership is special, and of the particular species of traffic or business to which it is confined. (Willet *v.* Chambers, Cowp. 814; De Berkom *v.* Smith and another, 1 Esp. N. P. R. 29; Arden *v.* Sharpe and another, 5 Esp. N. P. R. 524; Shirreff and another *v.* Wilks, 1 East, 48). In the case, Ex parte Bonbonus (8 Ves. 540), Lord Eldon expresses himself thus: 'I agree it is settled, that if a man gives a partnership engagement in the partnership name, with regard to a transaction, not in its nature a partnership transaction, he, who seeks the benefit of that engagement, must be able to say, that though in its nature not a particular transaction,

inoperative and void, as to the firm, if it was taken in discharge of the separate debt of the partner releasing it by his creditor knowing all the circumstances.[1]

§ 133. But although this is the general doctrine in the absence of all controlling circumstances; yet the presumption of any fraud or misapplication may be rebutted by the circumstances of the particular case. Thus it may be shown, that the other partners have directly or by fair implication authorized or confirmed the application of the partnership funds, securities, effects, or credits to the very purpose,[2] or that the partner had acquired, with the consent of his partners, an exclusive interest therein, or that, from other circumstances, the transaction was actually *bonâ fide*, and unexceptionable, although it went to the discharge of the private debt by one partner only.[3] For, it has been very justly remarked, that the application by a single partner of a joint security, in discharge of his individual debt, by no means necessarily establishes, that it is a fraud upon the firm; for it may not only have been expressly authorized by the firm, but it may frequently

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yet there was some authority beyond the mere circumstance of partnership, to enter into that contract, so as to bind the partnership; and then it depends upon the degree of evidence.'" See also Ex parte Bushell, 3 Montagu, Deacon & De Gex, R. 615.

[1] Gram *v.* Caldwell, 5 Cowen, R. 489; Evernghim *v.* Ensworth, 7 Wend. R. 326; Farrar *v.* Hutchinson, 9 Adol. & Ellis, 641.

[2] Wheeler *v.* Rice, 8 Cush. 205.

[3] Gow on Partn. ch. 2, § 2, p. 44 to 48, 3d edit.; Id. ch. 4, § 1, p. 149, 150, 151; 3 Kent, Comm. Lect. 43, p. 42, 43, 44, 4th edit.; Collyer on Partn. B. 3, ch. 1, § 4, p. 287, 288, 289; Id. p. 313 to 331; Id. ch. 2, § 3, p. 331 to 338, 2d edit.; Ex parte Agace, 2 Cox, R. 312; Ridley *v.* Taylor, 13 East, R. 175, 178, 182; Winter *v.* Crowther, 1 Cromp. & Jerv. 316; Baird *v.* Cochran, 4 Serg. & Rawle, 397.

result from prudential considerations and arrangements, referable to their own business and interests.[1] [So, the

[1] See Gow on Partn. ch. 4, § 1, p. 149, 3d edit.; Collyer on Partn. B. 3, ch. 2, § 3, p. 331 to 347, 2d edit.; Ex parte Bonbonus, 8 Ves. 540; Frankland *v.* McGusty, 1 Knapp, P. C. R. 274; Ridley *v.* Taylor, 13 East, 175, 178, 182; Watson on Partn. ch. 4, p. 202, 2d edit.; Shirreff *v.* Wilks, 1 East, R. 42; 2 Bell, Comm. B. 7, p. 616, 617, 5th edit. — In Ex parte Bonbonus (8 Ves. 540, 543, 544), Lord Eldon said: "This petition is presented upon a principle, which it is very difficult to maintain; that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money, that it is upon the separate account, and so, that it is against good faith, that he should pledge the partnership, then they should show, that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that a man borrowing money upon a bill of exchange pledging the partnership, without any knowledge in the bankers that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted, whether Hope *v.* Cust was not carried too far, yet that does not reach this transaction; nor Shirreff *v.* Wilks; as to which I agree with Lord Kenyon, that, as partners, whether they expressly provide against it in their articles (as they generally do, though unnecessarily), or not, do not act with good faith, when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt. The question of fact, whether this was fair matter of discount, or, being an antecedent, separate debt of Rogers, the discount was obtained merely for the purpose of paying that debt by the application of the partnership funds, which question is brought forward by the affidavits, though not by the petition, must lead to further examination. If the partners are privy, and silent, permitting him to go on dealing in this way, without giving notice, the question will be, whether subsequent approbation is not for this purpose equivalent to previous consent. Purnell, therefore, must explain himself upon this; for if he admits all these circumstances to have been in his knowledge, it will be very difficult to say he is entitled to the benefit of that principle, which is established for the safety of partners. That explanation, if material in 1793, is much more so now; when one of the partners is dead; another gone abroad; the managing clerk dead. Under these circumstances, if the examination as to the propriety of the proof made in 1793, which I consider a sort of judgment for the debt, cannot be gone into but under most unfavorable circumstances to those who made it, I cannot throw that diffi-

use of a partnership name by one partner for his own private benefit, may be ratified by the other partner, and no independent consideration is necessary to support a subsequent promise by the other partner to pay such partnership obligation.[1]] The mere fact, that a note, or security, or fund of the firm has been taken in discharge or payment of the separate debt of one partner, is not alone decisive of collusion, or fraud, or misapplication thereof. Neither is the fact, that the amount thereof has been passed to the separate private credit on account of one partner; nor that a note or security of the firm has been in part discounted, or applied to pay a separate debt of one partner; for all these cir-

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culty upon those who come forward then; and permit the inattention of the others, who might have come at any time since, to be prejudicial to third persons." Again he added: "In Fordyce's case, Lord Thurlow and the Judges had a great deal of conversation upon the law; and they doubted, upon the danger of placing every man, with whom the paper of a partnership is pledged, at the mercy of one of the partners with reference to the account he may afterwards give of the transaction. There is no doubt, now, the law has taken this course; that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *primâ facie*, it will not bind them; but it will if you can show previous positive authority. In many cases of partnership and different private concerns, it is frequently necessary for the salvation of the partnership, that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions therefore must be looked to, as well as that at the time. It is impossible now to forget, whatever I might have thought of it in 1793, that the person, upon whose evidence this joint demand could be cut down, is Purnell, the bankrupt; who could not be a witness at law; whose duty also it was to protect the partnership against this proof; and who has permitted it to stand all this time; and who upon all the circumstances appearing in these affidavits, if he should deny notice, could not be believed by a jury." See also Hood *v.* Aston, 1 Russ. R. 412, 415.

[1] Commercial Bank *v.* Warren, 1 Smith 15 N. Y. (Court of Appeals), 577.

cumstances may be consistent with entire good faith, and without gross negligence on the part of the creditor. There must, therefore, be some other ingredients in the case, importing some knowledge or suspicion of *malâ fides*, or some reasonable grounds, which should put the creditor upon further inquiry.[1] It may, however, be taken as the general rule, that where a note, or security, or fund of the firm has been taken in discharge of a separate debt of one partner, the burden of proof is on the holder or creditor to show circumstances, sufficient to repel every presumption of fraud, or collusion, or misconduct, or negligence, on his own part, unless indeed the circumstances, already in proof on the other side, repel such presumption.[2] And if the securities or

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[1] See Collyer on Partn. B. 3, ch. 2, § 3, p. 331 to 347, 2d edit.; Ridley *v.* Taylor, 13 East, 175; Ex parte Bonbonus, 8 Ves. 540 to 545; Hood *v.* Aston, 1 Russ. R. 412, 415.

[2] Frankland *v.* McGusty, 1 Knapp, P. C. R. 274, 301, 305, 306; Ex parte Bonbonus, 8 Ves. 540; Collyer on Partn. B. 3, ch. 2, § 3, p. 342, 343; Lloyd *v.* Freshfield, 8 Dowl. & Ryl. 19; 2 Carr. & Payne, 325; Foot *v.* Sabin, 19 Johns. R. 154, 157, 158; Dob *v.* Halsey, 16 Johns. R. 34, 38; Gansevoort *v.* Williams, 14 Wend. 133. — In Frankland *v.* McGusty (1 Knapp, R. 315), Sir John Leach (Master of the Rolls), in delivering the opinion of the court, said: "I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor, who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove, that it was given with the consent of the other partners. But there may be other circumstances attending the transaction, which may afford the separate creditor a reasonable ground of belief, that the security, so given in the partnership name, is given with the consent of the other partners; and those circumstances occurred in the case, which was cited, and which seemed to be inconsistent with the other authorities. I refer now to the case of Ridley *v.* Taylor. In that case the bill was dated eighteen days before its delivery by the partner to his separate creditor, and it was not known by the creditor that it was drawn and indorsed by the debtor alone; and the bill was to a greater amount than the separate debt. The court therefore were of opinion, that there was reasonable ground for the separate creditor believing it not to have been given to him in fraud of the partnership, and that the general presumption, that a partnership security, when

funds of the partnership are received in payment of the separate debt of one partner by his creditor, it

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applied in payment of a separate debt, is in fraud of the partnership, was repelled by the special circumstances which belonged to that particular occasion. Upon a consideration, therefore, of all the authorities, I am of opinion, that the law is, that taken *simpliciter* the separate creditor must show the knowledge of the partnership; but if there are circumstances to show a reasonable belief, that it was given with the consent of the partnership, it lies upon the partners to prove the fraud. I think that will reconcile all the cases." And again (Id. p. 305, 496): "The counsel seemed to be perfectly satisfied with a reference to one of the members of the court to examine what the law was in that case, it having been admitted here, that there was no direct evidence, whether these bills had been given with the assent of the partners, or whether they had not been given with their assent; and the question therefore was, when bills had been given by an individual partner in the name of the partnership firm, for his individual debt, upon whom the burden of proof lay to show that the other partners did not assent to the formation of those bills. Upon the consideration of that question, and examining all the authorities, it appeared to the member of the court, who had the duty of that examination, that, *simpliciter*, bills drawn by one partner for a separate debt in the partnership name, could not be recovered upon, as against the partnership firm; but that the person claiming payment of the bills must prove either a direct assent of the other partners to the formation of the bills, or if not such direct assent, that there were some circumstances in the transaction, from which the party taking them might reasonably infer, that they were given with the consent of the other partners." In Dob *v.* Halsey (16 Johns. R. 34, 38), Mr. Chief Justice Spencer, in delivering the opinion of the court, said: "This court has decided, in several cases, that where a note is given in the name of the firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted, and consent to the transaction. (Livingston *v.* Hastie and Patrick, 2 Caines, 246; Lansing *v.* Gane and Ten Eyck, 2 Johns. R. 300; Livingston *v.* Roosevelt, 4 Johns. R. 251.) In Ridley and another *v.* Taylor, 13 East, 175, the Court of King's Bench held, that if one partner draw or indorse a bill in the name of the partnership, it will, *primâ facie*, bind the firm, although passed by one partner to a separate creditor, in discharge of his private debt, unless there be covin between such separate debtor and creditor, or, at least, the want of authority, either express or implied, in the debtor partner, to give the security of the firm for his separate debt. The only difference between the decision of this court and that of the King's Bench, consists in this: We require the separate creditor, who has obtained the partnership paper for

will not be necessary for the partners to establish the

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the private debt of one of the partners, to show the assent of the whole firm to be bound; the rule of the King's Bench throws the burden of avoiding such security on the firm, by requiring them to prove that the act was covinous on the part of the partner, for whose private debt the paper of the firm was given, by showing, that it was done without the knowledge and against the consent of the other partners, and that the fact was known to the separate creditor, when he took the paper of the firm. I can perceive no substantial difference, whether the note of a firm be taken for a private debt of one of the partners, by a separate creditor of the partner pledging the security of the firm, and taking the property of the firm upon a purchase of one of the partners, to satisfy his private debt. In both cases, the act is equally injurious to the other partners; it is taking their common property to pay a private debt of one of the partners." The same point was decided in Foot *v.* Sabin, 19 Johns. R. 154, 157, 158, where the same learned judge said: "The plaintiff proved Holmes's signature to the note, and, also, that Wilson and Foot were partners, and that Wilson signed the name of the firm; and it appeared on the face of the note, that they signed as 'sureties' to Holmes. Whether we apply this proof to the general issue or to the special plea, the plaintiff has not maintained either issue. It was incumbent on him to show, that all the defendants were liable on the note, and that Wilson executed the note with the express assent and authority of Foot. In this case, it appearing, that the signature of the name of the firm, by Wilson, was not for a partnership debt, Wilson could not bind his partner, Foot. All the cases were reviewed in Dob *v.* Halsey (16 Johns. R. 38), and the principle established is this, that where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note the other partner is not bound, unless he has been previously consulted, and has consented to the transaction; and the burden of the proof, that the partner, who did not sign the note, consented to be bound, is thrown on the creditor. The same principle applies with greater force, when one of the partners becomes security for another person, and attempts to bind his copartners. The creditor is aware, that he is pledging the partnership responsibility in a matter in nowise connected with the partnership business; and that is a fraud on such of the partners as do not assent expressly that the firm shall be bound. When, therefore, it appeared, from the plaintiff's own showing, that the note was signed by Holmes, as principal, and by Wilson, with the name of the firm of Wilson and Foot, as sureties for Holmes, nothing was shown to bind Foot, and the plaintiff failed to maintain the issue. On the motion for a nonsuit, the court held, that the plaintiff was bound to prove the authority or consent of Foot, to the making the note, which the court considered he had done. There was no proof of any authority or consent

fact, that the creditor knew at the time, that it was a

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of Foot, except the proof of the signature of Wilson of the name of the firm. The court, then, certainly drew a very incorrect legal inference from the fact proved." Perhaps the whole doctrine cannot be summed up better than it is done by Mr. Chancellor Kent in his learned Commentaries. "In all contracts," says he, "concerning negotiable paper, the act of one partner binds all; and even though he signs his individual name, provided it appears on the face of the paper, to be on partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, in his own name only, and without appearing to be on partnership account, or, if one partner borrow money on his own security, the partnership is not bound by the signature, even though it was made for a partnership purpose, or the money applied to a partnership use. The borrowing partner is the creditor of the firm, and not the original lender. If, however, the bill be drawn by one partner in his own name, upon the firm, on partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. And though the partnership be not bound at law in such a case, it is held, that equity will enforce payment from it, if the bill was actually drawn on partnership account. Even if the paper was made in a case, which was not in its nature a partnership transaction, yet it will bind the firm, if it was done in the name of the firm, and there be evidence that it was done under its express or implied sanction. But if a partnership security be taken from one partner, without the previous knowledge and consent of the others, for a debt, which the creditor knew at the time was the private debt of the particular partner, it would be a fraudulent transaction, and clearly void in respect to the partnership. So, if from the subject-matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge of that fact, the partnership is not liable. There is no distinction in principle upon this point between general and special partnerships; and the question, in all cases, is a question of notice, express or constructive. All partnerships are more or less limited. There is none that embraces, at the same time, every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name he assumed. The conclusion is otherwise, if the subject-matter of the contract was consistent with the partnership business; and the defendants in that case would be bound to show, that the contract was out of the regular course of the partnership dealings. When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the

misapplication of the securities or funds; for the very

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partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership, to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership, with whose members he deals. And when a person takes a partnership engagement, without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority, or its regular course of dealing, he is, in judgment of law, guilty of a fraud. It is a well-established doctrine, that one partner cannot rightfully apply the partnership funds to discharge his own preëxisting debts, without the express or implied assent of the other partners. This is the case even if the creditor had no knowledge at the time of the fact of the fund being partnership property. The authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the partnership business, though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner." 3 Kent, Comm. Lect. 43, p. 41 to 43. The question, upon whom the burden of proof lies to show, that the partnership funds or securities have or have not been misapplied, by the application thereof to the payment of a separate debt of one partner, has been elaborately discussed in some other cases in the American Reports; and the conclusion is uniformly maintained, that the burden of proof is on the holder, and not on the other partners. In Gansevoort *v.* Williams, 14 Wend. R. 133, 135, Mr. Justice Nelson in delivering the opinion of the court examined all the cases at large. The following extract may not be unacceptable to the learned reader: "The English cases upon this subject are not always consistent with themselves; and even the same court, while they profess to adhere to their general position, namely, that the partner denying the authority of his associate must prove affirmatively, that the holder knew the paper was given in a transaction unconnected with the partnership; and also, that he did not assent, sometimes substantially disregard the latter qualification of the rule in the application of it to the facts. The case of Hope *v.* Cust, before Lord Mansfield, in 1774, cited by Lawrence, J., in 1 East, 52, is an instance. There one Fordyce, who traded largely in his private capacity, as well as in the business of a banker with others, had considerable dealings in his private capacity with Hope & Co., in Holland, and gave to them a general guaranty in the partnership name, for money due in his separate capacity. The plaintiffs failed in recovering on the guaranty. Lord Mansfield, in reporting the case to the Court of Chancery, it being an issue from that court, said he left it to the jury to say, whether, under the circumstances, the taking of the guaranty

nature of such a transaction ought to put him upon further inquiry; and however *bonâ fide* his conduct

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was, in respect to the partners, a fair transaction, or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust Fordyce was guilty of in giving it. Chitty on Bills, 33. The case seems to have been put to the jury, from the history given of it, upon the gross negligence of the plaintiffs in not discovering that Fordyce was committing a fraud upon his associates. But it does not appear, that there was any affirmative evidence showing that the other partners had not assented, and that this was known to the plaintiffs. In Ex parte Bonbonus, 8 Ves. 544, Lord Chancellor Eldon says, in Fordyce's case, Lord Thurlow and the judges had a great deal of conversation upon the law, and they doubted upon the danger of placing every man, with whom the paper of the partnership is pledged, at the mercy of one of the partners, with reference to the account he may afterwards give of the transaction. But he says, 'there is no doubt now the law has taken that course; that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *primâ facie* it will not bind them.' The case of Shirreff and another *v.* Wilks and others, 1 East, 48, is another instance. There the plaintiff, Oct. 1795, sold a quantity of porter to B. & W., partners, which was shipped by them to the West Indies. In April, 1796, R. came into the firm and continued till November following, when it was dissolved. The balance due for the porter, as settled by W., was £78, for which the plaintiffs drew upon the defendants the bill in question, which was accepted by B. in the name of the then firm. The court decided R. was not bound, and Lord Kenyon says, R. had no concern with the matter, and was no debtor of the plaintiffs; that no assent of his was found, and nothing to show that he had any knowledge of the transaction; that the transaction was fraudulent upon its face. In Ridley *v.* Taylor, 13 East, 175, the rule was applied by Lord Ellenborough with more strictness. There he required something more than the naked fact, that the bill in the name of the firm was given for the private debt of the member who drew it, and that fact known to the plaintiffs. The court would not infer want of authority or fraud upon these facts; and they considered the circumstances of the case of Shirreff and another *v.* Wilks and another, as having fairly authorized such a presumption, and that it was decided upon that ground. But in Green *v.* Deakin and others, 2 Stark. 347, a partnership security (a bill) was given by one member for his private debt to the plaintiff; and although it appeared expressly, that the plaintiff was not informed, that the associate had not concurred, yet Lord Ellenborough held, that the nature of the transaction was intrinsically notice, and he nonsuited him. So, in Wood *v.* Hollenbeck and others, Chitty on Bills,

may be, it is a case of negligence on his part, which will not entitle him to recover against the partner-

33, note z, the action was on a bill against three acceptors, where it appeared they were partners in a tea speculation, and the drawer, a wine merchant, drew it in payment of wine delivered to one of them; the jury were directed, if they found it was drawn without the knowledge or concurrence of the other two, they were not liable, omitting the necessity of bringing home affirmatively notice to the holder. It is not material to look any further into these cases; they will be found stated and referred to in Chitty on Bills, p. 29, 33. They all clearly prove, that while the English courts hold to the position, that the firm is liable on a bill or note made by one out of the partnership business, unless the holder knows that it was so made, and that the other partners did not concur, the frequent practical operation and effect of it under their direction does not essentially differ from the rule as settled in this court. They undoubtedly put the defence of the copartner upon the ground of fraud, committed upon him by his associate and the holder. But this is sometimes inferred from the fact, that the bill or note is given for a private debt, and that known to the holder; and at other times further proof is required negativing a presumed concurrence of the copartner. In this court, the cases are believed to be uniform from that of Livingston *v.* Hastie, 2 Caines, 246, *down to the present time, that where a note or other security is given in the name of the firm, by one partner for his private debt, or in a transaction unconnected with the partnership business, which is the same thing, and known to be so by the person taking it, the other partners are not bound, unless they have consented. 11 Johns. R. 544; 16 Johns. R. 34; 19 Johns. R. 154; 3 Wendell, 419; 5 Wendell, 223; 6 Wendell, 619; 7 Wendell, 158, 310. *Primâ facie*, the execution of the bill or note in the name of the firm by one partner binds the whole. The burden, therefore, of proving a presumptive want of authority, and of course fraud, for that necessarily follows, lies upon the copartners. 11 Johns. R. 544. We hold, that the fact of the paper of the firm being given out of the partnership business by one member is presumptive evidence of want of authority to bind the other members of the firm, and if the person taking it knows the fact at the time, he is chargeable with notice of want of authority, and guilty of concurring in an attempted fraud upon the other partners. It may be asked, why should the partners be bound at all, when the paper is in fact signed without their authority? This is no doubt against general principles, and involves the injustice of subjecting a person to answer for an act of another, to which he never expressly or impliedly assented. The answer is founded upon the law merchant. By entering into the partnership, each reposes confidence in the other, and constitutes him a general agent as to all the partnership concerns; and the inconvenience to com-

ship.[1] [But if one partner indorse and negotiate a note in the firm's name, but out of the legitimate business of

merce, if it were necessary, that the actual consent of each partner should be obtained, or that it should be ascertained, that the transaction was for the benefit of the firm in the ordinary transaction of their business, suggested the rule, that the act of one, when it has the appearance of being on behalf of the firm, is considered the act of the rest; and whenever a bill is drawn, accepted, or indorsed by one of several partners, on behalf of the firm during its continuance, which comes into the hands of a *bonâ fide* holder, the partners are liable to him, though in truth one partner only negotiated the bill for his own benefit, without the consent of the copartners. Swan and others *v.* Steele, 7 East, 210; Chitty on Bills, 30. There appears never to have been a doubt in England or in this State, in any of the cases, but that all the partners are bound, unless the *bona fides* can be impeached. What shall amount to an impeachment is oftentimes a debatable question, and in England seems to rest very much upon the circumstances of the case. There is more uniformity and precision in the application of the rule here. It is undoubtedly the practice of mercantile firms to indorse the bank paper of each other by the hand of any one of the members. Upon a strict application of the rule in this court, and upon some of the cases in England, such paper would not bind the firm, if the bank had knowledge of the facts. It is not within the purpose and business of a mercantile firm to indorse paper for their neighbors. Such business is not within the contemplation of the partnership, and therefore no authority is to be implied or attached to any one of the members. It might well alarm the mercantile community to lay down the position, that the partnership indorsement of accommodation paper, by one of the firm, for any person that might ask him, would be binding upon all, whether the holder knew the facts or not. Even the authority of one partner to sign bills and notes for the firm when interested, is only implied, and may be rebutted by notice. Chitty on Bills, 33. It would be a strange implication of authority, where the firm had no interest. But if it should appear, that a house was in the habit of indorsing at the bank or elsewhere for another, such general course of dealing would be sufficient evidence of authority from all the members of the firm, and such use of it by one would bind all. Duncan *v.* Lowndes & Bateman, 3 Campb. 478. The authority would not flow from the partnership, but from facts and considerations independently of it." See also, on the same point, Wilson *v.* Williams, 14 Wend. R. 146; Rogers *v.* Batchelor, 12 Peters, R. 221, 229 to 232.

[1] Rogers *v.* Batchelor, 12 Peters, R. p. 229 to 232; Powell *v.* Messer, 18 Texas, 407. — This point came directly before the Supreme Court of the United States in the case of Rogers *v.* Batchelor (12 Peters, R. 229), and

the company, a subsequent holder will be entitled to recover against the partnership, on proving that he

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was much discussed. Upon that occasion the Court said: "The first instruction raises these questions; whether the funds of a partnership can be rightfully applied by one partner to the discharge of his own separate preexisting debt, without the assent, express or implied, of the other partner; and, whether it makes any difference, in such a case, that the separate creditor had no knowledge at the time of the fact of the fund being partnership property. We are of opinion in the negative, on both questions. The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds, by any partner, beyond such purposes, is an access of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership; though in the case of *bonâ fide* purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle; and, in our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property, or to bind the rights of another, unless the latter has authorized the act. In the case of a partner, paying his own separate debt out of the partnership funds, it is manifest, that it is a violation of his duty and of the rights of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds, than the partner himself had. Does it make any difference, that the separate creditor had no knowledge at the time, that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud; not only in morals, but in law. That was expressly decided in Shirreff *v.* Wilks, 1 East, R. 48; and, indeed, seems too plain upon principle, to admit of any serious doubt. But we do not think, that such knowledge is an essential ingredient in such a case. The true question is, whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may reassert their claim to it in the hands of such creditor. The case of Ridley *v.* Taylor, 13 East, R. 172, has been supposed to inculcate a different and more modified doctrine. But upon a close examination, it will be found to have turned upon its own peculiar circumstances. Lord Ellenborough in that case admitted, that one partner could not pledge the partnership property for his own separate debt; and if he

became a holder before maturity, for a valuable consideration, and without notice of the fraud.[1]]

could not do such an act of a limited nature, it is somewhat difficult to see, how he could do an act of a higher nature, and sell the property. And his judgment seems to have been greatly influenced by the consideration, that the creditor in that case might fairly presume, that the partner was the real owner of the partnership security; and that there was an absence of all the evidence (which existed and might have been produced) to show, that the other partner did not know, and had not authorized the act. If it had appeared from any evidence, that the act was unknown to, or unauthorized by the other partners, it is very far from being clear, that the case could have been decided in favor of the separate creditor; for his Lordship seems to have put the case upon the ground, that either actual covin in the creditor should be shown, or, that there should be pregnant evidence, that the act was unauthorized by the other partners. The case of Green *v.* Deakin, 2 Stark. R. 347, before Lord Ellenborough, seems to have proceeded upon the ground, that fraud, or knowledge by the separate creditor, was not a necessary ingredient. In the recent case, Ex parte Goulding, cited in Collyer on Partn. p. 283, 284, 1st edit., the Vice-Chancellor (Sir John Leach), seems to have adopted the broad ground, upon which we are disposed to place the doctrine. Upon the appeal, his decision was confirmed by Lord Lyndhurst. Upon that occasion his Lordship said: 'No principle can be more clear, than that, where a partner and a creditor enter into a contract on a separate account, the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of this contract, so as to bind the firm.' There was no pretence in that case of any fraud on the part of the separate creditor. And Lord Lyndhurst seems to have put his judgment upon the ground, that unless the other partner assented to the transaction he was not bound; and that it was the duty of the creditor to ascertain, whether there was such assent or not. The same question has been discussed in the American courts on various occasions. In Dob *v.* Halsey, 16 Johns. R. 34, it was held by the court, that one partner could not apply partnership property to the payment of his own separate debt, without the assent of the other partners. On that occasion, Mr. Chief Justice Spencer stated the difference between the decisions in New York, and those in England to be merely this; that in New York the court required the separate creditor, who had obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound; and that in England, the burden of proof was on the other partners to show their want of knowledge or dissent. The learned Judge added: 'I can perceive no substantial difference, whether the note of a firm be

[1] Gildersleeve *v.* Mahony, 5 Duer, 383.

§ 133 *a*. Upon like principles, if the acting partners of a firm, or the governing body of a joint-stock company should unite with a stranger to produce a fraud against the firm or company for whom they act, a court of equity might interfere and repudiate such acts, and ask to be relieved against them.[1]

§ 134. There are other cases, which constitute exceptions to the general liability of partners for acts or contracts concerning the partnership business, which deserve special notice in this connection. One of them is, where in the very transaction, although it may be for the benefit or use of the partnership, and in the business thereof, yet the credit is exclusively given to the partner, transacting it, upon his sole and separate liability. The law is exceedingly clear and well settled upon this point. If money is borrowed, or goods bought, or any other contract is made by one partner upon his own ex-

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taken for a private debt of one of the partners by a separate creditor of a partner, pledging the security of the firm; and taking the property of the firm, upon a purchase of one of the partners to pay his private debt. In both cases, the act is equally injurious to the other partners. It is taking their common property to pay a private debt of one of the partners.' The same doctrine has been, on various occasions, fully recognized in the Supreme Court of the same State. And we need do no more than to refer to one of the latest; the case of Everughim *v.* Ensworth, 7 Wend. R. 326. Indeed, it had been fully considered long before, in Livingston *v.* Roosevelt, 4 Johns. R. 251. It is true, that the precise point now before us, does not appear to have received any direct adjudication; for in all the cases above mentioned, there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think, that the true principle to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favor of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge, that it was a partnership property; but upon the fact, whether the other partners had assented to such disposition of it, or not."

[1] Vigers *v.* Pike, 8 Clark & Fin. 562, 648.

clusive credit, he alone is liable therefor; and the partnership, although the money, property, or other contract is for their proper use and benefit, or is applied thereto, will in no manner be liable therefor.[1] [And if the contract is made with one alone, and credit is given to him, he is liable on such contract, without joining his copartners.[2]] For it is entirely competent for one partner to borrow money, or to buy goods, or to enter into contracts on his own sole and exclusive credit with third persons; and, on the other hand, it is equally competent for them to rely on that exclusive credit, and either to refuse to contract with the firm, or to exonerate the firm from all liability upon any contract, which would otherwise bind the firm, as being for their account and benefit. For the maxim of the common law here applies with its full force: *Modus et conventio vincunt legem;* and either party may at his pleasure waive or relinquish rights, to which he would otherwise be entitled. It is but following out the rule of natural justice and the exposition of the intention of the parties recognized in the Pandects. *Ante omnia enim animadvertendum est, ne conventio in aliâ re, aut cum aliâ personâ, in aliâ re aliâve personâ noceat.*[3]

§ 135. This very case was directly put in the Roman

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[1] Collyer on Partn. B. 3, ch. 2, § 2, p. 319, 2d edit.; Id. p. 342, 343; Ex parte Emly, 1 Rose, R. 61; Ex parte Bonbonus, 8 Ves. R. 540; Sylvester *v.* Smith, 9 Mass. R. 119, 121; Gow on Partn. ch. 4, p. 154, 155, 3d edit.; Lloyd *v.* Freshfield, 2 Carr. & Payne, 325; 9 Dowl. & Ryl. 19; Ketchum *v.* Durkee, 1 Hoffm. R. 528; Le Roy *v.* Johnson, 2 Pet. R. 198, 199, 200. See Trueman *v.* Loder, 11 Adol. & Ellis, 594, 595; De Mautost *v.* Saunders, 1 Barn. & Adol. 398; Bonfield *v.* Smith, 12 Mees. & Welsb. R. 405; Green *v.* Tanner, 8 Pick. R. 411.

[2] Hagar *v.* Stone, 20 Verm. 105; Stansfield *v.* Levy, 3 Starkie, 8; Murray *v.* Somerville, 2 Campb. 39 n.; Cleveland *v.* Woodward, 15 Verm. 302

[3] Dig. Lib. 2, tit. 14, l. 27, § 4; Pothier, Oblig. n. 85.

law, in relation to joint employers of ships, where one acted as the administrator of the concern, and contracted in his own name exclusively. *Si plures navem exerceant adversarios cum quolibet eorum in solidum agi potest. Ne in plures destringatur, qui cum uno contraxerit.*[1] The same rule is adopted in the French law; and accordingly Pothier says: When a partner has not contracted in the name of the firm, but in his own name alone, he alone will be bound, although the contract has been applied to the benefit of the partnership. Thus, if a partner has borrowed money in his sole name, for his own account, and then he applies the money to partnership purposes, the creditor cannot have any action against the firm; for, according to the principles of law, a creditor has his remedy only against the party with whom he has contracted, and not against those who have been benefited or received profit from it.[2] And this again is but the dictate of the Roman law. *Non adversus te creditores, qui mutuam sumpsisti pecuniam, sed ejus, cui hanc credideras hæredes experiri, contra juris formam evidenter postulas.*[3]

§ 136. One illustration may be taken from a case; which has already passed into judgment. In that case, one of two partners drew bills of exchange in his own name, which he procured to be discounted by a banker through the medium of the same agent, who procured the discount of other bills drawn in the partnership name, with the same banker; it was held by the court, that the banker had no remedy against the firm, either upon the bills so drawn in his own name, or for money,

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[1] Dig. Lib. 14, tit. 1, l. 25; Id. l. 2; Ante, § 102.
[2] Pothier, De Societé, n. 101, 105, 106.
[3] Cod. Lib. 4, tit. 3, l. 15.

had and received through the medium of such bills, although the proceeds were carried to the partnership account. The reason was, that the money was advanced solely on the security of the parties, whose names were on the bills by way of loan to them, and not by way of loan to the partnership. And it made no difference in the case, that the banker conceived at the time, that all the bills were drawn on the partnership account; since he did not credit the firm, but only the names on the bills.[1]

137. The French law has followed out the like doctrine to its legitimate conclusion. Whenever one partner in a commercial partnership contracts a debt in his own sole name, he alone will be responsible therefor; and the creditor will have no recourse against the partnership, even although the debt may have been contracted in behalf of, or for the benefit of the partnership.[2] And *à fortiori* in cases of non-commercial partnerships, the doctrine is held to apply;[3] with the reservation, however, that the other partners have not made him their agent to contract a joint obligation *in solido*, or otherwise.[4]

§ 138. Still, although the general principle is clear, it may not always be easy to apply it to the circumstances of particular cases; for it is often a matter of no inconsiderable difficulty and intricacy at the common law to ascertain in point of fact, whether there has been an exclusive credit given to one partner or not.

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[1] Emly *v.* Lye, 15 East, R. 7; Siffkin *v.* Walker, 2 Camp. R. 308; Ante, § 102; Post, § 142, 243. See Faith *v.* Richmond, 11 Adol. & Ell. R. 339.

[2] Pothier, De Societé, n. 100, 101.

[3] Pothier, De Societé, n. 105.

[4] Pothier, De Societé, n. 104, 105.

In the case of a dormant and secret partner, the credit is manifestly given only to the ostensible partner; for no other party is known. Still, however, it is not treated as an exclusive credit; for the law in all cases of this sort founds its decision upon the ground, that the creditor has had a choice or election of his debtor, which cannot be, where the partner is dormant and unknown.[1] The credit therefore is not deemed exclusive, but binding upon all, for whom the partner acts, if done in their business and for their benefit, as is the case in cases of agency for an unknown principal.[2]

§ 139. Another case may easily be put. Suppose a partnership to be carried on in the sole name of one of the partners, and he at the same time should transact business upon his own separate account; and he should borrow money in his own name. In such a case the question may arise, whether the partnership is bound for such borrowed money, or the individual partner only. And it must be resolved by taking into consideration the whole circumstances of the case. Thus, if the money is in fact borrowed for the partnership

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[1] Ante, § 63.

[2] Story on Agency, § 291, 292; 2 Kent, Comm. Lect. 41, p. 630, 631, 4th edit.; Paley on Agency, by Lloyd, 245, 250, 3d edit.; Thompson *v.* Davenport, 9 B. & Cresw. 78, 86, 87; Pothier on Oblig. n. 82, 83, 447; Collyer on Partn. B. 1, ch. 1, § 1, p. 11, 12, 14, 2d edit.; Id. B. 3, ch. 1, p. 259; Hoare *v.* Dawes, Doug. R. 371; Gow on Partn. ch. 4, § 1, p. 162, 163, 3d edit.; Saville *v.* Robertson, 4 Term R. 725; Robertson *v.* Wilkinson, 3 Price, R. 538; U. S. Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Kelley *v.* Hurlburt, 5 Cowen, R. 534; Mifflin *v.* Smith, 17 Serg. & Rawle, R. 25. — The law with regard to dormant partners extends only to commercial partnerships. It has, therefore, no application to dormant partners in land speculations. Pitts *v.* Waugh, 4 Mass. R. 421; Smith *v.* Burnham, 3 Sumner, R. 435.

business, or it is in fact applied to the partnership business, in the absence of all controlling circumstances, the partnership will be bound therefor; since the fair presumption is, that it was intended by the partner to pledge the partnership credit, and not merely his individual credit, whether the partnership was known or unknown to the lender. On the other hand, if the money was borrowed for the separate use of the individual partner, or actually applied to that use, the contrary presumption would prevail. But, if the business of the partnership were different from the separate business of the individual partner, and he should borrow expressly of the lender for the one business or for the other, the lender would be deemed to give credit to that particular business, and not to the other business; and then the partnership would or would not be bound according to the fact, whether it was borrowed for their business or not.[1] And, in such a case, it would make no difference, whether the lender did, or did not know, that there was any partnership in either business, or whether the money was actually applied to the business, for which it was expressly borrowed, or not. But in the absence of all proofs, as to the purpose, for which the money was borrowed, or to which it was applied, it would be deemed to be borrowed upon the separate account of the individual partner.[2]

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[1] [And the declaration by the borrower at the time, that it was on partnership account has been held sufficient proof to bind the firm. Oliphant *v.* Mathews, 16 Barbour, 608.]

[2] See Collyer on Partn. B. 3, ch. 1, § 2, p. 275, 276, 277, 2d edit.; Etheridge *v.* Binney, 9 Pick. 272; Mifflin *v.* Smith, 17 Serg. & Rawle, 165; U. States Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Oliphant *v.* Mathews, 16 Barbour, 610; South Carolina Bank *v.* Case, 8 B. & C. 427; Buckner *v.* Lee, 8 Georgia, 292.—In United States Bank

§ 140. Various other cases may be put to illustrate the same rule. Thus, if a person should advance money

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v. Binney, 5 Mason, R. 176, 183, 184, the court said: "In respect to both general and limited partnerships, the same general principle applies, that each partner has authority to bind the firm, as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will, *primâ facie*, bind the firm, unless it is ultra the business of the firm. Where the firm imports, on its face, a company, as A. B. & Co., or A., B., & C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm.[1] But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs must go further, and show, that it is a partnership signature. In the present case, the signature of 'John Winship' may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish, that it is a contract of the firm, and ought to bind them." And again: "The notes are all indorsed in the name of 'John Winship.' For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go further, and show either expressly or by implication, that these notes were offered by Winship, as notes binding the firm, and not merely on himself personally; or that the discounts were made for the benefit, and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove, that the bank, in discounting these notes, acted upon the belief, that they bound the firm, and were for the benefit and business of the firm. They must go further and prove, that the belief was known to and sanctioned by Winship himself in offering the notes; and that he intentionally held out to them, that the discounts were for the credit, and on the account of the firm; and that his indorsement was the indorsement of the firm, and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge from the whole evidence, how the case stands in these respects. The mere fact, that the discounts so procured were applied to the use of the firm is not, of itself, sufficient to prove, that the discounts were pro-

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[1] Barrett v. Swan, 17 Maine, 180; Holmes v. Porter, 39 Maine, 160.

for a firm, and yet take the security of one partner therefor, the security would bind that partner only.[1]

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cured on account of the firm. It is a strong circumstance, entitled to weight, but not decisive." In Etheridge *v.* Binney, 9 Pick. R. 274, the court said: "Now as the partner, whose name is assumed by the firm, may also engage in other branches of business, in which he may want credit on his own private account, if he applies for a loan of money to one, who is ignorant of the copartnership, and no information is given of its existence, it is a private loan, and does not bind the firm, unless the creditor shall know, that the money borrowed, or the goods procured, by the individual, went to the use of the firm. The burden of proof in such case is upon the creditor, in order to make good his claim upon the firm; for he credited the individual, and not the firm, and it will be presumed to be for the private benefit of the individual, unless the contrary is proved. But if the existence of the firm is known to the person, who makes the loan, and representations are made to him by the borrower, that he borrows for the use of the company, and that they are answerable for the debt, so that credit is given to the company, and not to the individual partner, the burden of proof is upon the company, when sued, to show that the power confided to the individual has been abused, and that the money borrowed was applied to his private use, and also, that this was known to the lender to be his intention. This principle necessarily follows from cases settled. If a purchase is made in the name of a firm, or money borrowed, and a note given or indorsed in that name, this is *primâ facie* evidence of a debt from the firm, and it can only be rebutted by proof in the defence, that this was fraudulently done by the individual partner for his own private use, and that this was known to the creditor. So that in the limited partnership, if the name of the firm had been John Winship & Co., or Winship & Binney, all notes given to any creditor, in either of those names, would be company notes, unless disproved, as before stated. Now, the making and offering of such a note is nothing more than a representation that the money is wanted for the use of the company, and as they confide in the individual, they will be bound by his acts. The name of the firm here being only the name of the individual, a note offered in that name, unaccompanied by any representation, would of course import only a promise by John Winship alone; and the credit being given to him alone, the creditor would not recover against the firm, without proving, that the

[1] Collyer on Partn. B. 3, ch. 2, § 2, p. 315 to 324, 2d edit.; Siffkin *v.* Walker, 2 Camp. R. 308; Emly *v.* Lye, 15 East, R. 7.

And, indeed, under such circumstances, if the separate security is knowingly taken upon advances for the firm, it will ordinarily be treated, as an election by the creditor, to absolve the partnership from responsibility, and to confine the credit to that partner only.[1] Nor will it make any difference in such a case, that the money has not only been borrowed, but has been applied to partnership purposes, if the contract has been exclusively upon the separate credit or security of one partner.[2] On the other hand, if money is actually borrowed on the credit of the firm in the course of the business of the firm, it will make no difference in the liability of the other partners, that it has been misapplied by the borrowing partner.[3] But care must be taken to distinguish between cases of this sort, and cases, where the separate security of one partner has been taken, not as

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money actually went into the funds of the firm. But if the borrowing partner states that he is one of a company, and that he borrows money for the company, or purchases goods for their use, then, as there is such company, and as they have given him authority to use the company credit to a certain extent, and as the creditor will have no means of knowing whether he is acting honestly towards his associates, or otherwise, if he lends the money or sells the goods on the faith of such representation, the company will be bound, unless they prove that the contract was for his private benefit, and known to be so by the creditor."

[1] Collyer on Partn. B. 3, ch. 2, § 2, p. 318, 319, 321, 2d edit.; Ex parte Hunter, 1 Atk. 223; Ex parte Emly, 1 Rose, R. 61; Gow on Partn. ch. 4, § 2, p. 154 to 156, 3d edit.

[2] Collyer on Partn. B. 3, ch. 2, § 2, p. 319, 320, 2d edit.; Bevan *v.* Lewis, 1 Sim. R. 376; Lloyd *v.* Freshfield, 2 Carr. & Payne, R. 325; Parkin *v.* Carruthers, 3 Esp. R. 248; Jaques *v.* Marquand, 6 Cowen, R. 497; Green *v.* Tanner, 8 Pick. R. 411.

[3] Collyer on Partn. B. 3, ch. 1, § 1, p. 263; Id. B. 3, ch. 2, p. 322, and note, 2d edit.; Church *v.* Sparrow, 5 Wend. R. 223; U. S. Bank *v.* Binney, 5 Mason, R. 176; s. c. 5 Peters, R. 529; Gow on Partn. ch. 4, § 2, p. 146, 147, 3d edit.; Id. § 3, p. 282 to 284; Ante, § 105.

the primary debt, but merely as collateral security for the primary debt, as one of the firm; for, in the latter case, the firm will undoubtedly be holden, notwithstanding the separate security.[1]

§ 141. The custom of a particular trade or business may in some cases also furnish an exemption of the partnership upon contracts made for their benefit, and establish, that the credit is exclusively given to the contracting partners. Instances, however, of this sort are of rare occurrence; and it has been remarked by a learned writer, that perhaps there is no ordinary trade or business, except that of stage-coach proprietors, in which the firm have been held not liable for repairs made, or goods supplied, by the order of one partner for the use of the concern.[2] In general, such proprietors are held bound, like all other partners.[3] But under some special circumstances, the credit has been held to be exclusively given to the partner ordering the repairs or supplies. Thus, where several persons furnished with horses, which were their several property, the several stages of a coach, and in the general business and profits all the proprietors were partners, and shared the profits, it was held, that the proprietors were not all jointly liable for goods furnished to one partner for the use of his horses, drawing the coach along his part of the road; and that the goods

[1] Collyer on Partn. B. 3, ch. 2, § 2, p. 323, 2d edit.; Id. p. 275; Ex parte Brown, 1 Atk. R. 225; Denton v. Rodie, 3 Camp. R. 493; South Car. Bank v. Case, 8 B. & Cresw. 427; Ex parte Bolitho, 1 Buck, R. 100.

[2] Collyer on Partn. B. 3, ch. 3, § 3, p. 329, 330, 2d edit.

[3] Ibid.; Arthur v. Dale, cited Collyer on Partn. B. 3, ch. 2, § 3, p. 330; 2d edit.

must be deemed furnished upon the exclusive credit of that partner.[1]

§ 142. The general rule is, as we have seen, that if a bill or note is drawn or indorsed in the name of one partner only, not being the firm name, it will not be a contract binding on the firm, but on himself only, even although it may be a transaction for the use or benefit of the firm.[2] But, nevertheless, cases might arise, where the partnership might be held liable, as the drawers or indorsers of the note or bill, notwithstanding it was made or indorsed only in the name of one partner.[3] But, then, in such cases, in order to bind the firm it must appear, that the other partners had constantly treated such note or bill, so made and indorsed, as the note, or bill, or indorsement of the firm in the adopted name of the partner, as a firm name, *pro hac vice;* or at least, as the note, or bill, or indorsement made by the firm by procuration of the partner, so that the holder would be at liberty to write over the partner's name the name of the firm by procuration of the partner (A. and B. by procuration of B.).[4] But, whether this would be so, or not, it has been held, that if one partner makes use of an assumed firm name, not the real name of the firm, and signs it by procuration of the assumed firm, and the other partners knew his habit of so doing, and

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1 Barton *v.* Hanson, 2 Taunt. R. 49; 2 Camp. R. 97; Hiard *v.* Bigg, Manning's Nisi Prius, Index, 220; Gow on Partn. ch. 4, § 1, p. 149, 150, 3d edit.

2 Collyer on Partn. B. 3, ch. 1, § 2, p. 277, 2d edit.; Id. B. 3, ch. 2, § 3, p. 331 to 347; Jaques *v.* Marquand, 6 Cowen, R. 497; Smith *v.* Craven, 1 Cromp. & Jerv. 500, 507; Ante, § 136; Trueman *v.* Loder, 11 Adol. & Ellis, R. 592; Faith *v.* Richmond, 11 Adol. & Ellis, 339; Ante, § 102.

3 Palmer *v.* Stephens, 1 Denio, R. 472.

4 South Car. Bank *v.* Case, 8 Barn. & Cresw. 427; Ex parte Bolitho, 1 Buck, R. 100.

adopted the note, or bill, or indorsement, as that of the firm, the partners will be held to have adopted the new firm name, *pro hac vice*, and will be bound by the contract.[1]

[§ 142 *a*. This liability of a partnership, notwithstanding the names of individuals only were used, is illustrated in the following case. Where the proprietors of a line of canal boats, by articles between themselves agreed that the business of the concern *at Rochester* should be conducted by J. A., one of the proprietors, in his own name, and that *at Albany* it should be conducted by W. M., an agent, in *his* name, but in behalf of and upon the responsibility of the defendants, who were two of the proprietors; that no copartnership name should be used, and no paper made, accepted, or indorsed in the name, or on account of the copartnership; and that each party should raise his share of the money needed by the concern upon his own responsibility, and the other parties were not to be liable therefor, but all the parties were to share equally in the profits; it was held, that a bill by J. A. in his own name, to raise money for the business of the concern, drawn upon and accepted by W. M., in *his* name, bound all the proprietors, at once as drawers and acceptors.[2]]

§ 143. The doctrine has even been pressed further; and it has been held, that a note or other security may be so signed, as at once to make the partner signing it separately liable, and also the firm liable thereon. Thus,

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[1] Williamson *v.* Johnson, 1 Barn. & Cresw. 146; Collyer on Partn. B. 3, ch. 1, § 2, p. 276, 277, 2d edit.; Id. B. 3, ch. 2, § 2, p. 319 to 324; In re Warren, Daveis, R. 325; Newton *v.* Boodle, 3 Manning, Granger & Scott, R. 792; Post, § 202.

[2] Bank of Rochester *v.* Monteath, 1 Denio, R. 402; Palmer *v.* Stephens, 1 Denio, R. 472.

where A. (one of the partners in the firm of A., B., and C.) made a promissory note in these words: "Sixty days after date, I promise to pay D., E., or order," &c., and signed the note "For A., B., & C. — A.;" it was held, that the firm was liable thereon, and also that he was separately liable; so that, in effect, it was treated as a joint and several security, a joint security of the firm, and a several one of the partners signing it.[1] This construction of the instrument certainly goes to the very verge of the law; and perhaps may be thought to deserve further consideration.

§ 144. Cases of a different character may occur, where the question, whether exclusive credit has been given to one partner, or joint contractor, may admit of

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[1] Lord Galway *v.* Mathews, 1 Camp. R. 403; Hall *v.* Smith, 1 B. & Cresw. 467; Staats *v.* Howlett, Denio, R. 559. See Story on Agency, § 154, 275, 276; Collyer on Partn. B. 3, ch. 1, § 2, p. 277, 2d edit. — In the case of Lord Galway, 1 Camp. R 403, the firm were held liable. In the case of Hall *v.* Smith, 1 Barn. Cresw. 407, which was a note of this sort payable to bearer, and was signed A., B., and C. by A., the suit was against A. only; and he was held separately liable. Mr. Justice Bayley on this occasion said: "In pronouncing judgment for the plaintiff, we shall not give to the note any different effect from that, which it appears upon the face of it to have. The words used are 'I promise to pay,' and it is signed by the defendant. What then is the import of those words? Surely, that W. Smith promises. It is true, that he promises for himself and others, but he alone promises. Now, there are many cases, where a party, entering into a contract in his own name on behalf of others, may be sued, or those, for whom he contracts, may be sued, and *e converso*, an agent may sue, or the parties beneficially interested may sue. If any hardship arise from this construction, it might have been avoided by introducing the pronoun 'we' instead of 'I;' and on the other hand, a great difficulty may be imposed upon the plaintiff, if he be compelled to sue all; for then he would be bound to prove the partnership of all the parties, whereas in this action it is sufficient to prove the handwriting of the defendant. The cases of March *v.* Ward, and Clark *v.* Blackstock, import, that the word 'I' creates a several promise by each party that signs, and here *a fortiori* that must be the effect of it, for the party sued is the only person, who actually made the promise. The plaintiff is therefore entitled to recover."

much discussion and difficulty, founded upon the peculiar circumstances thereof. Thus, in case one member of a club should order goods for the use and benefit of the club, all the members of the club, who concurred in the order, or subsequently ratified it, might be liable for the amount thereof, although the member, who ordered the goods, should be made debtor in the tradesman's books, unless it clearly appeared, that the tradesman meant to give exclusive credit to that member only; for such entry in the books would not of itself be decisive of an intent to give such exclusive credit.[1]

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[1] Delauney *v.* Strickland, 2 Starkie, R. 416; Flemyng *v.* Hector, 2 Mees. & Welsb. 172; Collyer on Partn. B. 1, ch. 1, § 1, p. 31, 2d edit. In the case of Flemyng *v.* Hector, Lord Abinger said: "I had thought, but without much consideration, at the Assizes, that these sort of institutions were of such a nature, as to come under the same view as a partnership, and that the same incidents might be extended to them; that, where there were a body of gentlemen, forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Several cases have been cited in the course of the argument, which do not apply, with the exception of one of them, to societies of this nature. Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole. So, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shown, to bind the partnership by a credit; he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me, that this case must stand upon the ground, on which the defendant put it, as a case between principal and agent; and I am the more inclined to look at it in that light, by an observation, made by Mr. Platt, in the course of the argument yesterday, on the subject of bills of exchange. I apprehend, that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an apparent necessity to accept, as in the case of a purchase of a pipe of wine. The party might draw a bill, but I do not think he could accept the bill to bind the members of the club. It is, therefore, a question here, how far the committee, who are to conduct the affairs of this club as agents, are authorized to enter into such contracts, as that, upon which the plaintiffs now seek to bind the mem-

§ 145. Neither does it necessarily follow, because two persons, who are not partners, have joined together to make a purchase for a joint shipment, that they will be jointly liable to the vendor for the purchase-money; for if the purchase has been made under circumstances which demonstrate that the vendor gave an exclusive credit to each of them for a moiety (as by drawing a separate bill on each for a moiety), then each will be solely and separately liable only for his own share.[1] And the same rule may be justly applicable to cases

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bers of the club at large; and that depends on the constitution of the club, which is to be found in its own rules; and upon two of the cases, those that were tried before me at Guilford, looking at these general rules, it certainly does strike me, that it is impossible to interpret them, so as to give the committee the power of dealing on credit, even for the purpose of the club. It appears by the rules, that every member is to pay his subscription of ten guineas as entrance money, before he can become a member, and a yearly subscription of five guineas; so, that by the provisions of the club, there is to be a fund in hand in order to bear the expenses. But then, again, every member, who makes use of the club, who either eats or drinks there, or takes any sort of refreshment, is to pay ready money. That shows again, that the club was not disposed, and not intended, to have any transactions on credit, even with its own members; and it also shows, that care was taken to provide ready money to meet every expense; so that, if a party, or a gentleman of the club, were to order any particular thing, that the club did not contain, he is to pay for it *instanter;* so that no occasion was expected to be necessary for the committee's pledging the credit of the club, or even their own. Under these circumstances, as the rules of the club, which are in writing, must be taken to form the constitution of the club, and are to be construed as matters of law, I do not see, what there was to go to the jury; I do not see any thing in these rules, of which the jury are to be the judges. The words are, 'to manage the affairs of the club;' the question then is, what the affairs of the club are. They are to have in their hands a subscription, and they are to take care, that every member pays it before he comes into the club, and pays for every thing he has in the club. It therefore appears, that the members in general intended to provide a fund for the committee to call upon. I cannot infer, that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?"

[1] Gibson *v.* Lupton, 9 Bing. R. 297.

of partnership, where such a division of the credit is authorized and acted upon by the vendor, with a clear understanding that it is to be an exclusive credit, *pro tanto*.

§ 146. The case of a debt, contracted prior to the existence of a partnership, has also sometimes been treated as a case where exclusive credit is given to the contracting party, and not to the firm, although they ultimately receive the benefit thereof.[1] But it may be resolved into the more general principle, that a contract can be obligatory only upon those who are parties to it, or derive a benefit from it at the time of its inception.[2] In short, the joint interest or joint liability must be contemporaneous with the formation of the contract itself, in order to superinduce the corresponding liability to perform it; and if there be no partnership then in existence, to be bound, or none which is a party or privy to the contract, it cannot be deemed their contract; but solely that of those who contracted, and were capable of contracting it at the time. Otherwise, the law would introduce the extraordinary anomaly of making a contract, consummate and perfect between all the original parties, expand so as to be in fact the contract of other parties, who had not, and perhaps could not, at the time, have any interest in, or privity, or connection therewith.[3]

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[1] See Ketchum *v.* Durkee, 1 Hoffm. R. 538.

[2] Gow on Partn. ch. 4, § 1, p. 150 to p. 153, 3d edit.; Collyer on Partn. B. 3, ch. 3, § 1, p. 348 to 368, 2d edit.; Saville *v.* Robertson, 4 T. R. 720; Ketchum *v.* Durkee, 1 Hoffm. R. 538. — Where no other time is fixed for the commencement of a partnership in an agreement between the parties, it is taken to have commenced on the date of the agreement, as the presumed intention of the parties. Williams *v.* Jones, 5 Barn. & Cresw. 108.

[3] Gow on Partn. ch. 4, § 1, p. 150, 151, 152, 3d edit. — Mr. Gow has well stated the principle, and illustrated it by the cause of Saville *v.* Rob-

§ 147. This doctrine may easily be illustrated by a few cases. Thus, if two persons should separately

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ertson, 4 Term R. 720. Mr. Gow says (p. 151, 152), "A joint contract, however, entered into by one or more individuals, is binding only upon those who have a joint interest in it at the time of its inception; for no subsequent act by any person, who may afterwards become a partner, not even an acknowledgment that he is liable, will entail upon that person the obligation of fulfilling such a contract, if it clearly appear, that a partnership did not exist at the time the contract was made. The joint interest must be contemporaneous with the formation of the contract itself, to superinduce the corresponding liability to perform it. If it were otherwise, the law would, in fact, create a supposed contract, when the real contract between the parties was consummated, before the joint interest and consequent joint risk was in existence. Thus, where several persons agreed upon a maritime adventure, and to provide a cargo of goods, which should, in the judgment of the majority, be proper for the voyage; and permission was given to the supercargo (who was to have a proportionate profit, and bear an equal loss with the respective adventurers) to ship, on the joint account, as many goods as he might think fit; such goods being first approved by a majority of the persons concerned in the adventure, as proper for the voyage; and it was afterwards agreed, that each party was to hold no other share or proportion in the adventure, than the amount of what each separately ordered and shipped; and that the orders given for the cargo and outfit of the ship were to be separately paid, and that one was not to be bound for any goods or stores ordered or shipped by the other; and that the supercargo should have free liberty to ship what goods were suitable to the voyage, over and above the ship and outfit, leaving room for those ordered by the adventurers; and that the ship should be made over in trust for the general concern; it was held, that if the supercargo afterwards purchased goods, as part of the cargo, and the ship sailed with the goods so purchased, he alone was liable for them, and not his co-adventurers jointly with him. The reason, on which this determination proceeded, seems to have been, that, after the purchase of the goods made by the several adventurers, there was still, before they became joint property, a further act to be done, which was the putting them on board the ship, in which they had a common concern for the joint adventure, and, until that further act was done, the goods purchased by each remained the separate property of the purchaser. The partnership in the goods did not arise until their admixture in the common adventure." Again he adds (p. 153): "It is not, however, sufficient to constitute a joint liability for the capital brought into the trade, that there is to be a subsequent participation in the profit derived from it. In such a case, the right to participation can only take its origin from the time of the introduction of the capital; and, although communion of profit is a strong circumstance to explain

purchase goods on their own separate accounts, and afterwards should agree to unite their interests therein, in one joint commercial adventure for their joint and mutual profit, this would create a partnership in the goods for that adventure. But it would not make them liable as partners to the vendors of the goods; for they then had no joint interest in the purchase.[1] The same rule would apply to a case, where one merchant should purchase goods on his own sole account, and afterwards should ship them upon a joint adventure for joint profits with other persons, whom he had subsequently admitted as sub-purchasers, or to whom he had subsequently sold an undivided interest in the goods; for in such a case the original credit was exclusively given to himself; and the other parties could in no just legal sense be deemed parties or privies to the contract of purchase.[2] It would ordinarily be otherwise, however, if the joint adventure were agreed upon before the purchase, and the purchase were to be

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a contract in itself doubtful, and to show, as the legal presumption is, that a partnership existed at the time amongst the participants; yet, where the nature of the contract clearly appears, it cannot have such a retrospect as to alter it, and to substitute the responsibility of several for that of an individual contractor. Therefore, if several persons agree to form a partnership, and that each shall contribute a certain share of the capital, and any of the persons borrow or purchase the share, which is by him afterwards brought into the common stock, the liability for payment to the lender or vendor is not joint, but personal."

[1] Gow on Partn. ch. 4, § 1, p. 151, 152, 153, 3d edit.; Saville v. Robertson, 4 Term R. 720; Collyer on Partn. B. 3, ch. 3, § 1, p. 348 to 358, 2d edit.; Id. p. 365, 366; Young v. Hunter, 4 Taunt. 582; Gouthwaite v. Duckworth, 12 East, R. 421.

[2] Gow on Partn. ch. 4, § 1, p. 151, 152, 153, 3d edit.; Young v. Hunter, 4 Taunt. R. 582; Greenslade v. Dower, 7 B. & Cresw. 635; Collyer on Partn. B. 3, ch. 3, § 1, p. 356, 357, 358, 2d edit.; Id. p. 365; Coope v. Eyre, 1 H. Black. 37; Gardner v. Childs, 8 Carr. & Payne, 345; Gouthwaite v. Duckworth, 12 East, R. 421.

made for all the persons concerned therein in the name of one.[1]

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[1] Gow on Partn. ch. 4, § 1, p. 151, 152, 153, 2d edit.; Gouthwaite *v.* Duckworth, 12 East, R. 422, 424; Waugh *v.* Carver, 2 H. Black. R. 235, 246; Gardiner *v.* Childs, 8 Carr. & Payne, 345; Smith *v.* Craven, 1 Cromp. & Jerv. 500; Post *v.* Kimberly, 9 Johns. R. 470; Felichy *v.* Hamilton, 1 Wash. Cir. R. 490; Collyer on Partn. B. 3, ch. 3, § 1, p. 349 to 357. — In the text the qualifying word "ordinarily" is inserted with reference to a suggestion of Mr. Justice Gibbs in Young *v.* Hunter, 4 Taunt. R. 583, 584, where he is reported to have said: "I am by no means of opinion, that there may not be a case, where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor; as if the parties agree amongst themselves, that one house shall purchase the goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods. In Gouthwaite *v.* Duckworth, 12 East, R. 425, 426, Lord Ellenborough said: "It comes to the question, whether, contemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, for the adventure; that was the agreement. Then what was the adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of Saville *v.* Robertson does indeed approach very near to this. But the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement for the adventure, of which it has been before settled, that Duckworth was to have a moiety. There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods, in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint account of the three; yet, if all agree to share in goods to be purchased and in consequence of that agreement, one of them go into the market and make the purchase, it is the same for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them." Mr. Justice Bayley added: "In Saville *v.* Robertson, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship, in which they had a common concern, for the joint adventure; and,

§ 148. The same rule will apply to cases, where there is a separate loan of money to one of several

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until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement." See Collyer on Partn. B. 3, ch. 3, § 1, p. 356, 357, 358, 2d edit.; Gardiner v. Childs (8 Carr. & Payne, 345), and Smith v. Craven (1 Cromp. & Jerv. R. 500), where the subject was much considered. In this last case, A., B., and C., not being general partners, entered into a joint speculation for the purchase and importation of corn, and each was to contribute a third. A. paid his share; and the bankers of B. advanced money to B. on his individual credit, which was applied to the payment of bills drawn by B. in the course of the said speculation. It was held, that A. was not liable to pay the bankers for the advance; since it was manifest, that it was raised on his individual credit. On this occasion Bayley, J., said: "If I supply my agent with money, which he misapplies, and raises money elsewhere, can the person, from whom he obtains the money, sue me for the amount? If this had been a claim by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called upon them all for payment. It is not a claim by the seller but by the person, who, as between the parties themselves, is the mere hand, by which the money is advanced. Wharton having given collateral security, the plaintiffs, as his agents and on his credit, not knowing any thing of the other parties, pay the money, and pay it in discharge of that, which is the individual debt of their principal, and of him alone. As agents they had no notice that they made the payment, except on the individual behalf of Wharton; he only was trusted, and the advances were made on his credit alone; the plaintiffs were not deluded by the prospect of a partnership security, and the claim must be restricted to Wharton alone. See what a situation the defendant Craven would be placed in, were it otherwise. He was justified in supposing, that Wharton's share was raised out of his own funds. He finds, that all the bills are honored, when they become due, with funds, which he would naturally conclude were really the funds of Wharton; and to my mind, it would be most unjust, if, after a lapse of time, Craven, having settled the full amount of what, as between himself and Wharton, he was bound to pay, a third person were allowed to come forward and say, 'I advanced the money on the credit of Wharton only, but I find, that it was applied in payment of your liabilities, and therefore I look to you.' A party is not liable as a partner, except he give to his partner express or implied authority to pledge his credit in the transaction, out of which the claim arises. Now, what authority does Craven appear to have given to Wharton to borrow this money from the plaintiffs? It is not sufficient

joint adventurers, for the purpose of founding a partnership or joint adventure; the firm, when formed, will not be liable for the advance; for the case is not distinguishable from one, where several persons are to contribute their separate proportions of money towards a common fund for joint purposes, and each is to borrow, and does borrow, his own share upon his own separate account and credit.[1] In short, in all cases of this sort, in order to bind the firm, the intended partner must either have had an original authority to purchase goods, or borrow money upon the joint account, and have exercised that authority by a purchase or loan on their account, and not on his own exclusive credit, or the transaction must have been subsequently ratified and adopted by the firm, as one for which they were originally liable, or for which they now elect to give their joint security.[2]

§ 149. These cases seem sufficiently clear upon principle. But others may arise, where the application of it may involve more complexity of circumstances, and of course more embarrassment in enunciating it. Thus, where A. and B., stationers, ordered certain papermakers to supply paper to C. and D., printers, for the purpose of printing certain specified works; and it

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to say, that Craven was relieved from a liability; for, your payment of my debt does not make me your debtor, unless the payment be made at my request. The partnership was not liable, unless Wharton had an authority from them to borrow; and no such authority, express or implied, exists in the present case."

[1] Collyer on Partn. B. 3, ch. 3, § 1, p. 357 to 360, 2d edit.; Saville v. Robertson 4 T. R. 720; Greenslade v. Dower, 7 B. & Cresw. 635; Wilson v. Whitehead, 10 Mees. & Welsb. 503.

[2] Collyer on Partn. B. 3, ch. 3, § 1, p. 357, 359, 360, 2d edit.; Saville v. Robertson, 4 Term R. 720; Gouthwaite v. Duckworth, 12 East, R. 421; Brown v. Gibbons, 5 Bro. Parl. R. by Tomlins, 491; Gow on Partn. ch. 4, p. 150 to 153, 3d edit.

turned out afterwards in proof, that C. and D. were interested as partners in the publication of those works, the question arose, whether C. and D. were liable to the paper-makers for the paper supplied. The solution of that question depended upon another, and that was: when the partnership in the publication of those works commenced, whether before or after the paper was ordered. If before, then all the partners were liable, and C. and D. among them; if after, then A. and B. only were liable. And to arrive at a just conclusion on the subject, it might be material to consider, whether the ordering of the goods was the exclusive act of A. and B., and intended to be upon their own exclusive credit; or was to be on that of the joint concern, with the approbation of all who were to participate in the publications.[1] So, where A., B., and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments; B. was to be the editor; and C. to be the printer; and after payment of all expenses they were to share the profits of the work equally; C. was to furnish the paper and charge it to the account at cost prices; and no profits were ever made, nor any accounts settled; the question arose, whether a third person, who furnished the paper to A. for the purpose of being used by him in printing the periodical, could maintain an action therefor against A., B., and C., or was limited to an action against C. only. The court

[1] Gardiner *v.* Childs, 8 Carr. & Payne, R. 345; Collyer on Partn. B. 3, ch. 3, § 1, p. 356, 357, 2d edit.

held that A., B., and C. were not jointly liable therefor, but C. only.[1]

§ 150. So, in other cases of goods supplied, or work and labor done, or services performed for persons who are about engaging in a joint undertaking, and are taking preliminary steps for establishing the same, it is often a matter of no small nicety to ascertain who of the parties are liable therefor.[2] In contemplation of law, the joint liabilities will of course commence only from the time when the parties have agreed to act together for the common purpose, and that precise time is sometimes difficult to ascertain.[3] There is a

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[1] Wilson *v.* Whitehead, 10 Mees. & Welsb. R. 503.

[2] Collyer on Partn. B. 3, ch. 3, § 2, p. 365, 2d edit.; 2 Bell, Comm. B. 7, ch. 3, p. 649 to 652, 5th edit.; Young *v.* Hunter, 4 Taunt. R. 582; Bourne *v.* Freeth, 9 Barn. & Cresw. 632; Braithwaite *v.* Scofield, 9 B. & Cresw. 401; Howell *v.* Brodie, 6 Bing. New Cas. 44.

[3] [See Atkins *v.* Hunt, 14 New Hamp. R. 206. — Gilchrist, J., here observed: "There is of course an essential difference between a mere proposition to form a partnership, and its actual constitution. Persons may take a deep interest in the objects to be accomplished by the company; may make donations to aid its progress; or may sign their names to subscription papers for the same end, without being liable for debts which other persons may contract in the prosecution of the same purpose. But a difficult question often arises, as to where the proposition to make the contract ends, and the contract itself begins. In Bourne *v.* Freeth, 9 B. &. C. 632, a prospectus was issued, stating the conditions upon which the company was formed; that the concern was to be divided into twenty shares, to be under the management of a committee, and ten per cent. of the subscriptions to be paid in by a certain date. It was held that this prospectus imported only that a company was to be formed, and not that it was actually formed, and that the signature to the prospectus did not indicate to any person who should read it that the signer had become a member of a company already formed. So in a case where all the acts proved and relied on were equally consistent with the supposition of an intention on the part of the defendant to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership, it was held that he was not a partner.

gradual progress even in the formation of schemes of this nature; and preliminary acts are sometimes done, and orders given by several persons, before they have absolutely fixed upon being concerned in the joint undertaking; and yet it rests in negotiation, whether they shall, or shall not, become partners.[1] In such

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Dickinson *v.* Valpy, 10 B. & C. 128, per Parke, J. And where a prospectus for a company was issued, to be conducted pursuant to the terms of a deed to be drawn up, it was held that an application for shares, and payment of the first deposit, did not constitute one a partner who had not otherwise interfered in the concern. Fox *v.* Clifton, 6 Bingh. 776. It was an important element in that decision, that the deed was not executed by the defendant who was sought to be charged as a partner. In Howell *v.* Brodie, 6 Bingh. N. C. 44, the defendant, from 1829 until 1833 advanced various sums, with a view to a partnership in a market about to be erected; knew that the money was applied towards the erection, and was consulted in every stage. In October, 1833, it was settled by a written agreement that he should have a seventh share of it; but it was held that he was not liable as a partner until October, 1833, although profits had been made but not accounted for to him before that time. Lord C. J. Tindal mentions the fact that no account of profits was rendered previous to October, 1833, as being in favor of the defendant."]

[1] Questions of this sort often arise in cases of unincorporated joint-stock companies, in which every member is liable *in solido* for the debts contracted on account of the partnership, as every member is in ordinary commercial partnerships. In joint-stock companies many preliminary acts are done towards the establishment of the company; and it often becomes a matter of nicety to ascertain, when a person is actually a member and partner, or not. The general doctrine is well summed up by Mr. Collyer (Collyer on Partn. B. 5, ch. 1, § 2, p. 735 to 743). He says: "In joint-stock companies, more than in any other kind of partnership, a variety of acts are done before the partnership is actually commenced. Notices are published, prospectuses are distributed, meetings are held, officers are chosen, deposits are paid, and scrip receipts are given long before the business is commenced, or the deed of settlement is executed. Indeed, many of these acts are necessarily done before even the full complement of the intended shareholders is made up. Hence, although the prime movers and agitators of the scheme will undoubtedly be liable in respect of the contracts, into which they enter for the purpose of launching the company; yet they cannot by such proceedings bind those who merely answer their invitation; those for instance, who name themselves sub-

cases the question resolves itself ultimately rather into a question of fact than of law; and until the partnership is definitively fixed and agreed on, those only are liable, who have acted and ordered the materials, or work, or labor, or services.[1]

[§ 150 *a*. Thus where certain persons, proposing to form a company, applied to the defendant to become president, to which he assented, and permitted himself to be publicly named as such; but the company was never formed, though meetings preliminary to its formation were had, at one of which the defendant

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cribers, and even pay deposits, and do other acts showing an intention of becoming partners, but who, by neglecting to observe the rules, or to comply with the demands of the society, never become entitled to share the profits. The contract of partnership, as regards these passive subscribers, is executory only, and may be abandoned, if the terms of the partnership are not reasonably fulfilled by the projectors. Under such circumstances, they never have become actual partners in the concern, and, consequently, have never rendered themselves liable for its debts. In the language of a learned judge: 'If there is a contract to carry on business by way of present partnership between a certain definite number of persons, and the terms of that contract are unconditional, or complete, then the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those contracts are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear, that he is not bound by them, on the simple ground, that he has never authorized them.'" See also Fox *v.* Clifton, 6 Bing. R. 776; 9 Bing. R. 115; Harvey *v.* Kay, 9 Barn. & Cresw. 356; Bourne *v.* Freeth, 9 Barn. & Cresw. 632, 638; Dickinson *v.* Valpy, 10 Barn. & Cresw. 123, 142; Doubleday *v.* Muskett, 7 Bing. R. 110, 118; Pitchford *v.* Davis, 5 Mees. & Welsb. R. 2; Howell *v.* Brodie, 6 Bing. New Cas. 44.

[1] Collyer on Partn. B. 3, ch. 3, § 1, p. 348 to 350, 2d edit.; Id. 365, 366; Id. B. 5, ch. 1, § 2, p. 735 to 743; Howell *v.* Brodie, 6 Bing. New Cas. 44; Gouthwaite *v.* Duckworth, 12 East, R. 421; Young *v.* Hunter, 4 Taunt. R. 582; 2 Bell, Comm. B. 7, ch. 3, p. 649 to 652, 5th edit.

presided; it was held that the jury might, if they thought fit, infer that the defendant held himself out as contracting for work to be done in respect of such preliminary meetings, though the order for such work was not directly given by the defendant; and that the defendant, if he so held himself out, was liable for the work performed.[1]]

§ 151. Upon the like ground, where, previous to the formation of a company, a prospectus, signed by the defendant, was issued, indicating that it was in contemplation to form the company; and it appeared, that the defendant solicited others to become shareholders, and was present at a meeting of the subscribers, when it was proposed to take certain premises to carry on the business of the concern, which were afterwards taken; but he never paid his subscription; it was held, that the defendant was not chargeable, as a partner for goods supplied to the company; for he did not hold himself out to the world, as a partner in a company already formed, but to one, which was to be, or might thereafter be formed.[2] It would have been otherwise,

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[1] Lake *v.* Duke of Argyll, 6 Adol. & Ellis, New R. 477; Wood *v.* Duke of Argyll, 6 Manning & Granger, R. 928.

[2] Bourne *v.* Freeth, 9 B. & Cresw. 632; Dickinson *v.* Valpy, 10 B. & Cresw. 128. See Forrester *v.* Bell, 10 Irish Law & Eq. R. 555; Fox *v.* Clifton, 6 Bing. R. 776. — In this last case Lord Chief Justice Tindal said: "Upon this first question, therefore, whether a partnership was actually formed, we think, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of a partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made; inasmuch as they had never fulfilled the conditions, upon which they subscribed. We think the matter proceeded no further, than that the defendants had offered to become partners in a projected concern, and that the concern proved abortive before the period, at which the partnership was to commence; and, therefore, with respect to the agency of the directors, which is the legal consequence of a partnership com-

if he had held himself out as a partner in a company already formed;[1] or had contributed to its funds, and had been present at a meeting of the company, and a party to a resolution to purchase the goods.[2] On the other hand, if a party supposes himself by mistake to have an interest in a company already formed, and he has not; if he does not hold himself out as a partner, and no credit is given to him, the contracts of the company will not bind him, although he should afterwards, acting under the mistake, declare himself to have an interest therein.[3]

§ 152. From what has been already stated, it is apparent, that an incoming partner (that is, a new partner coming into an existing firm) will not be liable

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pletely formed, we think the directors proceeded to act before they had authority from these defendants; for they began to act in the name of the whole, before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors, who made such contract, and of those subscribers, who by executing the deed have declared themselves partners, and of any, who have by their subsequent conduct recognized and adopted the acts and contracts of the directors. But they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments. It is unnecessary to advert to any of the cases, which have been referred to, each of which must rest upon its own peculiar circumstances; except that with respect to Perring *v.* Hone, decided in this court, we think it right to observe, that the great point, whether there was a partnership or not, does not appear to have been made the prominent subject of argument, but to have been rather assumed than disputed; for the advertisement or prospectus was not brought to the attention of the court, nor is there any argument upon the terms of it. It is not incompatible with that determination, that the court might have held the proof of partnership incomplete, if the same materials had been brought before them, which are presented to us."

[1] Ibid.; Blandy *v.* Herbert, 7 B. & Cresw. 401; Fox *v.* Clifton, 6 Bing. R. 776; Howell *v.* Brodie, 6 Bing. New Cas. 44.

[2] Ibid.

[3] Vice *v.* Anson, 7 Barn. & Cresw. 409. [Explained in Owen *v.* Van Uster, 1 Eng. Law & Eq. R. 396.]

in respect to debts, contracted by the firm previously to his entering it.[1] But although this is the clearly established doctrine, yet it does not follow, that an incoming partner may not become liable for such debts, by expressly assuming them upon a proper consideration, or otherwise dealing with the creditor in such a manner as to create an implied obligation and duty to pay the same in common with the old firm. The presumption of law, indeed, is against any such liability; but the presumption, like many others, may be removed by due and satisfactory proofs of the contrary intention and agreement.[2] Thus, for example, if the balance due from the old firm be with the consent of the creditor, and all of the new firm carried to the debit of the new firm, the latter deriving a benefit therefrom, as a credit or deposit, it is very clear, that the new firm will be bound thereby and therefor, as their own debt.[3] *A fortiori*, the same rule will apply, where it is an express stipulation of the partnership between the old firm and the incoming partner, that the new firm shall assume all the outstanding debts of the firm, and shall pay the same, and the creditor shall assent thereto and take the new firm, as his debtors.[4]

§ 153. Indeed, it may be generally stated, that, in all cases of this nature, the primary consideration is,

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[1] Collyer on Partn. B. 3, ch. 3, § 2, p. 361, 2d edit.; Shirreff *v.* Wilks, 1 East, R. 48; Williams *v.* Jones, 5 Barn. & Cresw. 108; Vere *v.* Ashby, 10 Barn. & Cresw. 289; Ayrault *v.* Chamberlin, 26 Barbour, 88.

[2] Ibid.; Cutt *v.* Howard, 3 Starkie, R. 5; Ex parte Jackson, 1 Ves. Jr. R. 131; Kirwin *v.* Kirwin, 2 Cromp. & Mees. 617; Helsby *v.* Mears, 5 Barn. & Cresw. R. 584; Beale *v.* Mouls, 10 Adol. & Ellis, New R. 976.

[3] Collyer on Partn. B. 3, ch. 3, § 2, p. 361 to 365, 2d edit.; Ex parte Peele, 6 Ves. 602.

[4] Ibid.

not so much to ascertain between what parties the original contract was actually made, as it is to ascertain whether there has subsequently been, with the consent of all the parties, any change or extinguishment of that contract. Where it is established by satisfactory evidence, that, upon the accession of a new partner, a new promise has been made by the entire new firm, in respect of the old debt, with the consent of the old partners, as well as of the creditor, it will amount to a novation of the debt, as it is called in the Roman law (*Novatio debiti*), and the new partner will be chargeable with the debt. But such an adoption or ratification of the new promise by the new partner must be clearly shown, otherwise it will not be obligatory upon him; and it cannot be inferred from the mere act of joining in the partnership, without other circumstances in aid of the inference.[1]

§ 154. Hitherto we have been principally considering cases, where either an exclusive credit has been given to one partner in the partnership business, or where the transaction could not, from its nature and character, or its period of commencement or origin, be deemed to bind the partnership. But it is quite possible for third persons to enter into a contract with one partner, under an impression that the particular contract is made with and binding on the firm, when in point of law it has no such obligation. (1.) Thus, in the first place (as we have seen),[2] if a person should lend and advance money to a firm at the request of

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[1] Collyer on Partn. B. 3, ch. 3, § 2, p. 364, 365, 2d edit.; Vere *v.* Ashby, 10 Barn. & Cresw. 288. See also Lloyd *v.* Ashby, 2 Barn. & Adol. R. 23; Hobey *v.* Roebuck, 7 Taunt. R. 157; Ketchum *v.* Durkee, 1 Hoffm. R. 528.

[2] Ante, § 136, 137, 140, 142.

one partner, and take his separate note or bill, or other security, for the amount, not intending thereby to give an exclusive credit to such partner, it is very clear, that he cannot sue the partnership on such note or bill, or other security, whatever might be his remedy against the firm for the money lent and advanced.[1] (2.) In the next place, if a third person should contract with one partner in a matter beyond, or unconnected with the partnership business, the firm will not be liable to him upon such contract, although he may have implicitly trusted to the credit of the firm, and not to the individual partner alone.[2] (3.) In the next place, a third person may, upon receiving a consideration, assent to such private arrangements of a firm, as will deprive him in point of law of any remedy against the firm, or a part of them, although he did not so intend.[3] (4.) And in the next place (as we have seen),[4] the custom of a particular trade may essentially affect the liability of the firm to a third person upon a contract, made with one of the partners, if that person has full notice of the custom, and is therefore bound by it, whatever might have been his own private interpretation thereof, as to its being an obligation binding on the firm.[5]

§ 155. The liability of the firm to third persons may

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[1] Collyer on Partn. B. 3, ch. 2, § 2, p. 315 to 323, 2d edit.; Siffkin *v.* Walker, 2 Camp. R. 308; Emly *v.* Lye, 15 East, R. 7; Denton *v.* Rodie, 3 Camp. R. 493; Watt *v.* Kirby, 15 Illinois, 200.

[2] Collyer on Partn. B. 3, ch. 2, § 2, p. 316, 324, 325, 326; Ex parte Agace, 2 Cox, R. 512.

[3] Collyer on Partn. B. 3, ch. 2, § 2, p. 316, 326 to 329, 2d edit.; Bolton *v.* Pullin, 1 Bos. & Pull. R. 539.

[4] Ante, § 141.

[5] Collyer on Partn. B. 3, ch. 2, § 2, p. 316, 329 to 331, 2d edit.; Barton *v.* Hanson, 2 Taunt. R. 49; Hiard *v.* Bigg, Manning's Nisi Prius, Dig. Index, 220; Gow on Partn. ch. 4, § 1, p. 149, 150, 3d edit.

thus, in the very origin or progress of the transactions of one partner, or other person, assuming to act in behalf of the firm, not only never arise, or it may be varied, limited, or qualified; but even when the liability has clearly attached, and become absolute and binding, subsequent transactions between such third persons and one of the partners may work an extinguishment of such liability, either wholly or partially.[1] Thus, if a partnership were originally liable to a creditor for a debt, and he should afterwards accept a security of one partner, at all events, if it should be a security of a higher or negotiable nature, for the whole debt, as a satisfaction thereof, wholly or in part, it will operate as an extinguishment of the debt of the partnership.[2]

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[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 376 to 383; Id. p. 385 to 389, 2d edit.; Gow on Partn. ch. 3, § 1, p. 129, 3d edit.; Newmarch *v.* Clay, 14 East, R. 239; 2 Bell, Comm. B. 7, ch. 2, p. 638, 639, 5th edit.; Ante, § 146, 150.

[2] Gow on Partn. ch. 4, § 1, p. 155, 156, 157, 3d edit.; Collyer on Partn. B. 3, ch. 3, § 3, p. 385 to 389, 2d edit.; Reed *v.* White, 5 Esp. R. 122; Evans *v.* Drummond, 4 Esp. R. 89, 92; Newmarch *v.* Clay, 14 East, 239; Stephens *v.* Thompson, 28 Verm. 77; Thompson *v.* Percival, 5 Barn. & Adol. 925.—It is laid down in Gow on Partn. (ch. 4, § 1, p. 155, 156, 157, 3d edit.), that the security should be of a higher nature than the original debt, in order to extinguish the partnership debt. But that doctrine has since been overturned. The very question was before the court in Thompson *v.* Percival, 5 Barn. & Adol. 925. On that occasion Lord Denman, in delivering the opinion of the court, said: "It appears to us, that the facts proved raised a question for the jury, whether it was agreed between the plaintiffs and James, that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, we think, that the agreement and receipt of the bill would be a good answer on the part of Charles Percival to this demand, by way of accord and satisfaction. It is not necessary to determine, whether the assent of Charles to this agreement was necessary, in order to give it such an operation; because if it was, there is evidence of a delegation by Charles to James to make such an agreement; for James had the partnership effects left in his hands, and was to pay all the partnership debts. It cannot be doubted, but that, if a chattel of any

Upon the like ground, if the creditor should receive the separate security of each partner, for his own share

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kind had been, by the agreement of the plaintiffs, and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required, that the chattel should be of equal value; for the party receiving it is always taken to be the best judge of that in matters of uncertain value. Andrew *v.* Boughey, Dyer, 75, a. Nor can it be questioned, but that the bill of exchange of third persons, given and accepted in satisfaction of the debt, would be a good discharge. But it is contended, that the acceptance of a bill of exchange by one of two debtors cannot be a good satisfaction, because the creditor gets nothing, which he had not before. The written security, however, which was negotiable, and transferable, is of itself something different from that which he had before; and many cases may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry. The cases of Lodge *v.* Dicas (3 B. & A. 611), and David *v.* Ellice (5 B. & C. 196), are said to be against this view of the law. [Lodge *v.* Dicase, may now be considered as overruled. Lyth *v.* Ault, 11 Eng. Law & Eq. R. 581. See Wilds *v.* Fessenden, 4 Met. 12; Harris *v.* Lindsay, 4 Wash. C. C. 271.] In the former, however, no new negotiable security was given, nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the court. In the latter, no bill of exchange was given, and that decision, on consideration, is not altogether satisfactory to us. We cannot but think, that there was abundant evidence in that case to go to a jury (and upon which the court might have decided), of the payment of the old debt by Inglis, Ellice & Co. to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account by mutual consent, as by actual payment of money. The cases of Evans *v.* Drummond (4 Esp. N. P. C. 92), and Reed *v.* White (5 Esp. N. P. C. 122), are authorities the other way. In the former, Lord Kenyon points out forcibly the altered relation of the parties by the substitution of the bill of the remaining partner for that of the firm; and it is difficult to see on what ground he decided the case, unless upon this, viz., that such substitution under an agreement operated as a satisfaction, as far as regarded the retiring partners; and in Reed *v.* White, Lord Ellenborough acted upon that authority, and so directed a special jury of merchants, who entirely agreed with him. These cases were afterwards brought to the notice of Lord Ellenborough, who expressed his approbation of them, in Bedford *v.* Deakin (2 Stark. N. P. C. 178). That case, however (which was also before the court, in 2 B.

of the debt, in satisfaction thereof, all joint liability of the partnership for the debt would henceforth be gone.[1] The doctrine is equally true in the converse case, where a partnership is a creditor, and the separate and distinct security of the debtor is taken to each partner severally for his share of the debt.[2]

§ 156. This question most generally occurs in cases of a retiring partner, where the creditor, knowing of his retirement, subsequently gives credit to the remaining partners, or to the new firm, and enters into new and separate contracts with the latter, touching his debt, or allows his property to remain under their control and management, as, for example, by way of new deposit, or by carrying the balance to the debit of the new firm, or by deferring payment of balances upon receiving additional interest, or by receiving a separate security therefor, or upon other considerations. In such cases the general conclusion is, that exclusive credit is intended to be given to the new firm; and if so, then the retiring partner is discharged.[3] But the mere striking

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& A. 210), was distinguished from them, because the creditor there expressly reserved the liability of the original debtors. If, therefore, the plaintiffs in this case did expressly agree to take, and did take the separate bill of exchange of James in satisfaction of the joint debt, we are of opinion, that his doing so amounted to a discharge of Charles." See s. p. Kirwan *v.* Kirwan, 2 Cromp. & Mees. 617; Hart *v.* Alexander, 2 Mees. & Welsb. 396; Harris *v.* Farwell, 15 Eng. Law & Eq. R. 70; Benson *v.* Hadfield, 4 Hare, R. 37; Collyer on Partn. B. 3, ch. 3, § 3, p. 385 to 398, 2d edit.

[1] Gow on Partn. ch. 3, § 1, p. 129, 130, 3d edit.; Garret *v.* Taylor, 1 Esp. N. P. Dig. 117; Kirkham *v.* Newstead, 1 Esp. N. P. Dig. 118; Collyer on Partn. B. 3, ch. 5, § 1, p. 467, 2d edit.; Watson on Partn. ch. 8, p. 420, 2d edit.

[2] Ibid.

[3] Evans *v.* Drummond, 4 Esp. R. 89; Reed *v.* White, 5 Esp. R. 122; Oakley *v.* Pasheller, 10 Bligh, N. S. 548; S. C. 4 Clark & Finn. 207; Hart *v.* Alexander, 2 Mees. & Welsb. 483; Thompson *v.* Percival, 5 B. & Adol. 925; Davaynes *v.* Noble, 1 Meriv. R. 530; Farrar *v.* Deflinne, Carrington & Kir-

of the balance, and carrying the same to a new account, opened with the new firm, will not alone extinguish the original debt against the old firm, unless accompanied by other circumstances, which establish, that a new and exclusive credit is given to the new firm.[1]

§ 157. In cases of this sort, where there are running accounts between the firm and third persons, and one of the partners retires, the question, as to the appropriation of payments, subsequently made by the partners remaining in the firm, often arises, and especially in relation to banking transactions. As to this the doctrine has been generally laid down, that where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts. If he does not appropriate it, the creditor may make an appropriation. But if there is no appropriation by either party, and there is an account current between them (as is the case between banker and customer), the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being discharged or re-

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wan, N. P. R. 580; 2 Bell, Comm. B. 7, ch. 2, p. 638, 639, 5th edit.; Gow on Partn. ch. 5, § 2, p. 244, 245, 3d edit.; Collyer on Partn. B. 3, ch. 3, § 3, p. 376 to 398, 2d edit. — The cases of David *v.* Ellice, 5 B. & Cresw. 197, and Lodge *v.* Dicas, 3 Barn. & Ald. 611, are the other way. But their authority seems shaken, if not entirely overturned, in the more recent decisions, and especially in the cases of Thompson *v.* Percival, 5 Barn. & Adol. 925, and Hart *v.* Alexander, 2 Mees. & Welsb. 484; Harris *v.* Farwell, 15 Eng. Law & Eq. R. 70; Lyth *v.* Ault, 11 Eng. Law & Eq. R. 581. See Collyer on Partn. B. 3, ch. 3, § 3, p. 383 to 398, 2d edit.; Id. B. 3, ch. 3, § 2, p. 326, 327, where all the authorities are collected and commented on. See also Gow on Partn. ch. 4, § 1, p. 155 to 159, 3d edit.

[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 391, 392, 2d edit.; David *v.* Ellice, 5 B. & Cresw. 196; Lodge *v.* Dicas, 3 Barn. & Ald. 611; Hart *v.* Alexander, 2 Mees. & Welsb. 484.

duced by the first item on the credit side.[1] To apply these principles to cases of retiring partners: Where there is a cash account current between a firm and a customer, and the account is in favor of the latter, a retiring partner will be liable for the balance of this account at the time of his retirement. But if the account be continued, the balance, for which the retiring partner is liable, will be diminished by every payment, which is made by the new firm, supposing such payment not to be appropriated to the discharge of any specific item; because in such case, it is the first item on the debit side of the account, which is discharged or reduced by the first item on the credit side.[2]

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[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 376 to 383, 2d edit.; Davaynes v. Noble, Clayton's Case, 1 Meriv. R. 572. See Copland v. Toulman, 1 West, R., House of Lords, p. 165; s. c. 7 Clark & Fin. 350.

[2] Post, § 253 to 256; Ibid.—Mr. Collyer has added in another place (p. 321), the following remarks: "To render an appropriation of payment by the act of the party valid, it must be made at the time of payment, if made by the payor, and within a reasonable time after payment, if made by the payee. Sir William Grant was inclined to hold, according to the principles of the civil law, that the appropriation, even if made by the payee, must be made at the time of payment. But cases might be stated, where such a rule, if strictly adhered to, would be productive of injustice; and it is manifestly at variance with the decisions on this subject in the courts of common law. On the other hand, those courts have been inclined to favor the creditor too much, and have in many cases 'extended the proposition—that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases—much beyond its original meaning, so as in general to authorize the creditor to make his election when he thinks fit.' In a recent case, however, the court of King's Bench came to a very just decision on this important subject. Thus, in Simson v. Ingham, an action on a bond was brought by Bruce & Co., bankers, against the heirs and devisees of Benjamin Ingham. The bond was given by Ingham and another, bankers, at Huddersfield, to the plaintiffs, their London correspondents, conditioned for remitting money to provide for bills, and for the repayment of such sums as Bruce & Co. might advance on account of persons constituting the Huddersfield Bank. The damages were assessed by an arbitrator at £13,845, subject to the opinion of the court, upon the following facts: The house of Bruce &

§ 158. It frequently happens, that upon the retirement of one partner, the remaining partners undertake

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Co. were in the habit of sending to the Huddersfield Bank monthly statements of their accounts. Benjamin Ingham died in September, 1811. The last statement sent previously to his death was for the month of August. The balance of that account was greatly in favor of Bruce & Co. No alteration in the account was made in the books of Bruce & Co. immediately on the death of Benjamin Ingham; but, during the residue of that month and a part of October, the remittances made by the Huddersfield Bank, and the payments made for them by Bruce & Co., were entered in continuation of the former account. Before, however, any account was transmitted to the Huddersfield Bank, subsequent to that for August, Bruce & Co., in consequence of a communication with their solicitor, opened a new account, and in that inserted all the remittances and payments made subsequent to the death of Benjamin; and in November, they transmitted to the Huddersfield Bank, statements of two accounts. The first of these accounts was thus entitled: — 'Debtors, Messrs. B. & J. Ingham & Co. (old account), in account with Bruce & Co., creditors;' and the first item on the debit side was the balance of August. The second account was in the same form, but entitled 'new account.' This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the month of October. From this time the old and new accounts were kept separate in the books of Bruce & Co. The Huddersfield Bank did not appear to have ever objected to the accounts being kept separately by Bruce & Co., although in their own books they only kept one account. The arbitrator was of opinion, that, under these circumstances the balance due on the death of Benjamin Ingham was not discharged by subsequent payments by the new firm. Accordingly, after making certain allowances for dishonored bills, he assessed the damages at the sum above awarded; and the court of King's Bench held the award to be right. In the preceding case, the court proceeded on the principle, that the entries, which had been continued in the creditor's books immediately on the death of Ingham, not having been communicated to the debtors, were not conclusive on the creditors, and consequently, that the general legal appropriation, of which such entries would otherwise have been evidence, was incomplete. It is clear from this, as also from the express opinions of the Judges, that they did not consider it necessary, in order to support any alleged appropriation on the part of the creditor, that he should prove it to have been made at the time of payment. On the other hand, if payment be made to the creditor of any sum in respect of an account current, the creditor making no appropriation at the time of payment, and if after such payment the debtor and creditor con-

to pay the debts and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners;[1] and can in no respect be admitted to vary the rights of the existing creditors of the firm.[2] But in all cases of this sort it may be stated, as a general doctrine, that if the arrangement is made known to a creditor, and he assents to it, and by his subsequent act, or conduct, or binding contract, he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner, especially if the retiring partner will sustain a prejudice, and the creditor will receive a benefit from such act, conduct, or contract.[3] Some illustrations of this doctrine have been already stated in the cases of an exclusive credit given to the new firm.[4] So, if the creditor should give up the securities of the old firm, and take those of the new firm in lieu thereof; or should give a prolonged credit to the new firm for the old debt, receiving from the latter, in consideration thereof, an additional interest, or a new security; in all such cases the retiring partner would be held discharged.[5] But the mere fact

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tinue their mutual dealings, or do any other mutual act in respect of the same account, the creditor will be barred by such subsequent transactions from establishing an appropriation of the payment."

[1] [And if the new firm misapply the assets they will be liable to the outgoing partner for any payments by him of the old debts. Peyton *v.* Lewis, 12 B. Monroe, 358.]

[2] Collyer on Partn. B. 3, ch. 2, § 2, p. 327 to 329, 2d edit.; Id. B. 3, ch. 3, § 3, p. 383 to 400.

[3] Collyer on Partn. B. 3, ch. 3, § 3, p. 383 to 398, 2d edit.

[4] Ante, § 152.

[5] Collyer on Partn. B. 3, ch. 3, § 3, p. 383 to 398, 2d edit.; Evans *v.* Drummond, 4 Esp. R. 89; Reed *v.* White, 5 Esp. R. 122; Thompson *v.* Percival, 5 Barn. & Adol. 595; Oakley *v.* Pasheller, 10 Bligh, R. 548; s. c. 4 Clark & Fin. 207; Gough *v.* Davis, 4 Price, R. 400; Harris *v.* Lindsay,

of the creditor's taking an additional security from the new firm without surrendering the old, or of his receiving interest from the new firm, without varying from that due on the old debt; or of his acquiescing in delay, without contracting upon any new consideration to prolong the credit, will not absolve the retiring partner from his original responsibility.[1]

§ 159. In this connection, it seems proper to inquire into the circumstances, which will or will not exonerate a retiring partner from future liability for the new debts and liabilities, contracted by the firm with third persons, after his retirement. Of course the retiring partner is not by his retirement exonerated from the prior debts and liabilities of the firm.[2] [Thus, if goods be sent to a firm to sell on commission, and one partner retires before they are all sold, he still continues liable to the consignor for the receipts of sales by the continuing partner; since the liability attaches on re-

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4 Wash. Cir. R. 271; Hart v. Alexander, 2 Mees. & Welsb. 484. But see Yarnell v. Alexander, 14 Missouri, 619.

[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 383 to 398, 2d edit.; Featherstone v. Hunt, 1 Barn. & Cresw. 113; Bedford v. Deakin, 2 B. & Ald. 210; Daniel v. Cross, 3 Ves. 377; Harris v. Lindsay, 4 Wash. Cir. R 271; Blew v. Wyatt, 5 Carr. & Payne, 397; Smith v. Rogers, 17 Johns. R. 340. [Harris v. Farwell, 15 Eng. Law & Eq. R. 70. In this case a firm consisted of three members. One of them died in 1837, and a new partner was admitted. A creditor of the old firm received interest on his debt from the new firm until 1841, when they became bankrupt. He then proved his claim against the new firm, swearing they were indebted to him for money received to his use. The separate estate of the deceased partner was held *not* discharged thereby.] All these cases turn upon the same general consideration; whether there has been a new and exclusive credit given to the new firm in extinguishment of the debt, or to the prejudice of the firm.

[2] Gow on Partn. ch. 5, § 2, p. 240 to 251, 3d edit.; Collyer on Partn. B. 3, ch. 3, § 3, p. 369 to 372, 2d edit.

ceipt of the goods;[1] and notice to the consignor of the fact of dissolution would not exonerate the retiring partner.[2]] In the first place, then, a dormant partner is not liable for any debts or other contracts of the firm, except for those which are contracted during the period that he remains a dormant partner. Upon his retirement his liability ceases, as it began, *de jure*, only with his accession to the firm.[3] The reason is, that no credit is, in fact, in any such case given to the dormant partner. His liability is created by operation of law, independent of his intention, from his mere participation in the profits of the business; and therefore it ceases by operation of law, as soon as such participation in the profit ceases, whether notice of his retirement be given or not.[4] But this doctrine must be taken with its appropriate qualifications; and it is strictly applicable only, where the persons dealing with the firm have no knowledge whatsoever, that he is a dormant partner. If the fact of his being a dormant partner be unknown to all the creditors, no notice whatever of his retirement is necessary; if it be known to a few, notice to those few is necessary; because they may fairly be presumed to have given credit to the firm with reference to their knowledge of the dormant partner.[5]

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[1] Briggs *v.* Briggs, 15 N. Y. R. (1 Smith), 471.

[2] Dean *v.* McFaul, 23 Misso. 76.

[3] Collyer on Partn. B. 1, ch. 2, § 2, p. 74, 2d edit.; Id. B. 3, ch. 3, § 3, p. 370, 371; Gow on Partn. ch. 5, § 2, p. 251, 3d edit.; 3 Kent, Comm. Lect. 43, p. 68, 4th edit.

[4] Collyer on Partn. B. 1, ch. 2, § 2, p. 74, 2d edit.; Id. B. 3, ch. 3, § 3, p. 370, 371; Gow on Partn. ch. 5, § 2, p. 251, 3d edit.; 3 Kent, Comm. Lect. 43, p. 68, 4th edit.; Ayrault *v.* Chamberlin, 26 Barbour, 89.

[5] Ibid.; Evans *v.* Drummond, 4 Esp. R. 89; Newmarch *v.* Clay, 14 East, R. 239; Farrar *v.* Deflinne, 1 Carr. & Kirw. 580.

§ 160. In the next place, where an ostensible or known partner retires from the firm, he will still remain liable for all the debts and contracts of the firm, as to all persons, who have previously dealt with the firm, and have no notice of his retirement.[1] This is a just result of the principle, that where one of two innocent persons must suffer from giving a credit, he who has misled the confidence of the other, and has been the cause of the credit, either by his representation, or his negligence, or his fraud, ought to suffer, instead of the other. And where a person notoriously holds himself out as a partner, all the world, who deal with the firm, are presumed to deal with it upon his credit, as well as upon that of the other members of the firm; and his omission to give them notice of his retirement is equivalent to a continual representation, that he still remains a member of the firm, and liable therefor.[2] But, as to persons who have had no previous dealings with the firm, and no knowledge who are or have been partners therein, a different rule may prevail. In such cases, unless the ostensible partner, who has retired, suffers his name still to appear, as one of the firm, so as to mislead the public (as by its being stated, and still remaining in the firm name), he will not be liable to mere strangers, who have no knowledge

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[1] Collyer on Partn. B. 3, ch. 3, § 2, p. 368 to 371, 2d edit.; Gow on Partn. ch. 5, § 2, p. 240 to 252, 3d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 640, 641, 5th edit.; Clapp *v.* Rogers, 2 Kernan, 283; Pope *v.* Risley, 23 Misso. 185.

[2] Collyer on Partn. B. 3, ch. 3, § 3, p. 369 to 375, 2d edit.; 3 Kent, Comm. Lect. 43, p. 66, 67, 68, 4th edit.; Gow on Partn. ch. 5, § 2, p. 248 to 251, 3d edit.; Id. ch. 4, § 1, p. 198; Graham *v.* Hope, Peake's R. 154; Gorham *v.* Thompson, Peake's R. 42; Wardwell *v.* Haight, 2 Barbour, R. 549; Watson on Partn. ch. 7, p. 384, 385, 2d edit.; Davis *v.* Allen, 3 Comst. 172.

of the persons, who compose the firm, for the future debts and liabilities of the firm, notwithstanding his omission to give public notice of his retirement; for it cannot truly be said in such cases, that any credit is given to the retiring partner by such strangers. Every new creditor or new customer is bound to inquire, who are the parties really interested at the time in the firm, if he would be safe in his credit and dealings with them. *Unusquisque debet esse gnarus conditionis ejus, cum quo contrahit.*[1] *A fortiori*, if public notice has been

[1] 2 Bell, Comm. B. 7, p. 642, 5th edit.; Collyer on Partn. B. 3, ch. 3, § 2, p. 369 to 375, 2d edit.; Parkin *v.* Carruthers, 3 Esp. R. 246; 3 Kent, Comm. Lect. 43, p. 67, 68; Williams *v.* Keats, 2 Starkie, R. 290; Brown *v.* Leonard, 2 Chitty, R. 120; Newsome *v.* Coles, 2 Camp. R. 617; Dolman *v.* Orchard, 2 Carr. & Payne, 104; Tombeckbee Bank *v.* Dumell, 5 Mason, R. 56; Lansing *v.* Gaine & Ten Eyck, 2 Johns. R. 300; Ketcham *v.* Clark, 6 Johns. R. 144, 148; Carter *v.* Whalley, 1 Barn. & Adol. 11; Le Roy *v.* Johnson, 2 Peters, R. 198, 200. — I am aware, that the doctrine is sometimes laid down more broadly, and the liability is made to attach, unless the partner has given public notice of the dissolution. Thus, in Parkin *v.* Carruthers (3 Esp. R. 248, 249), Mr. Justice Le Blanc said: "The principle on which I proceed is this: — That there was a partnership subsisting, under the firm of Parkin, Campbell & Co., which continued after the retirement of John Campbell. The rule of law is clear, that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties, who at first composed the firm." In summing up to the jury, his Lordship laid it down as the law on the subject, "That if the plaintiff advanced the money, even after the time that one of the partners had retired, if he did not know of such retirement, he had a right to sue all who before constituted the partnership. In point of fact in this case, John Campbell had retired; but still, if this was really a partnership, and the money was lent to the persons carrying on trade under that firm, all were liable." But in this case, Campbell's name was in the name of the firm. See also Gow on Partn. ch. 5, § 2, p. 248, 249, 3d edit.; Id. p. 251 to 253; 2 Bell, Comm. B. 7, ch. 2, p. 640, 641, 642, 5th edit. It strikes me, however, that the text contains the true principle. Where a partnership is in fact dissolved by the retirement of a partner, who is known, but whose name is not in the firm, it does not seem right to make him liable

given of his retirement, the retiring partner will not be liable to new creditors or customers, even if they

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to third persons, who afterwards trust the firm, without knowing who compose it at the time, or of the previous connection of the retiring partner. His case does not, under such circumstances, seem essentially to differ from that of a dormant partner; for such third persons give no credit to him, and he receives no share of the profits derived therefrom. Mr. Watson has stated the true principle; that "as credit is given to the whole firm, justice requires, that all those, who belonged to it, should be bound, while it is supposed to exist." But to whom bound? Certainly, to those only, who give credit to the firm, believing, that the original partners, whom they knew, still continued in it. The case of Carter *v.* Whalley (1 Barn. & Adol. 11) seems directly in point, in support of the doctrine of the text. There the debt was contracted after the retirement of one partner, and no public notice had been given thereof. But although it was known to some persons, that he was a partner, yet it did not appear, that this creditor knew it, or believed it, or gave credit to the partner. Mr. Justice Parke, on that occasion, said: "The plaintiff was bound to show an acceptance by four parties; that is, that Veysey, who did not accept the bill, was authorized to do so by the three others named in the declaration. Saunders had given no direct authority; he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case, if he had done business with the plaintiff before, as a member of a firm, or had so publicly appeared as a partner, as to satisfy a jury, that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But in order to render him liable on this ground, it is necessary, that he should have been known as a member of the firm to the plaintiffs, either by direct transactions, or public notoriety. In the present instance, that was not so. The name of the company gave no information as to the parties composing it, and the plaintiff did not show, that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one, as that the plaintiff must have known it. Carter, the plaintiff, lived at Birmingham; it should have appeared, that there had been such a dealing at that place by Saunders, or that his connection with the company had been so generally known there, that a knowledge of it by Carter must have been presumed. There having been no evidence for the jury on these points, I think the nonsuit was right."

have never seen such notice, or had any knowledge or information thereof;[1] since the retiring partner has done all, which can be reasonably required to give public notice of his withdrawal.[2]

[§ 160 *a*. The rules of notice, proper to ordinary trading partnerships, are not applicable always to companies established under statutes. For instance; A., B., C. and D., who carried on business under the firm of G. P. & Co., in 1840 opened an account with a banking company, established under the 7 Geo. 4, ch. 46, and 1 & 2 Vict. ch. 96. In 1842, A. retired from the firm; but this fact was not advertised in the London Gazette; nor was any change made in the pass-book. It was held, that the mere fact of D., one of the firm of G. P. & Co., being also a director of the banking company (but having, as such, no share in the management of or interference in the banking accounts) did not amount to notice —actual or constructive — to the bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing; a banking company, so established, differing in this respect from an ordinary trading partnership.[3]]

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[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 369 to 372, 2d edit.; Parkin *v.* Carruthers, 3 Esp. R. 248; Gow on Partn. ch. 5, § 2, p. 248, 249, 3d edit.; Newsome *v.* Coles, 2 Camp. R. 617; Godfrey *v.* Turnbull, 1 Esp. R. 371; Wright *v.* Pulham, 2 Chitty, R. 121; s. c. 1 Stark. R. 375.

[2] Ibid. — We are of course to understand this doctrine with the qualification, that nothing is otherwise done by the retiring partner to continue his liability; such, for example, as by authorizing the negotiable securities of the old firm to be issued and negotiated in the name of the old firm; for in such case, he would be bound by such indorsement. Collyer on Partn. B. 3, ch. 3, § 3, p. 372 to 375, 2d edit. See also Abel *v.* Sutton, 3 Esp. R. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Heath *v.* Sanson, 4 B. & Adol. 172.

[3] Powles *v.* Page, 3 Manning, Granger & Scott, R. 16.

§ 161. What will amount to due and sufficient notice of the retirement of a partner is a question of fact, often of no small nicety and difficulty; for notice needs not be express; but it may be constructive, and be implied from circumstances. A notice in one of the public and regular newspapers of the city or county, where the partnership business was carried on, is the usual mode of giving the information, and may, in ordinary cases, be quite sufficient. But even the sufficiency of that notice might be questioned in many cases, unless it is shown, that the party entitled to notice is in the habit of reading the paper.[1] Public notice given in some such reasonable way, will not be deemed actual and express notice; but it will be good presumptive evidence, and sufficient for a jury to conclude all persons, who have not had any previous dealings with the firm. As to persons, who have been previously in the habit of dealing with the firm, it is requisite, that actual notice should be brought home to the creditor, or at least, that the credit should be given under circumstances, from which actual notice may be inferred.[2] If the facts are all found or ascertained, the reasonableness of notice may be a question of law for the Court. But generally it will be a mixed question of law and fact, to be submitted to a jury under the direction of the Court, whether notice in the particular case, under all the circumstances, has been sufficient to justify the inference of actual or constructive knowledge of the fact of the dissolution. The weight of authority seems now to be, that notice in one of the usual advertising gazettes of the place, where the business was carried on, when

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[1] Pope v. Risley, 23 Misso. 185.

[2] See Page v. Brant, 18 Ill. 38.

published in a fair and usual manner, is of itself notice[1] of the fact to all persons, who have not been previous dealers with the partnership.[2]

§ 162. The same principles apply to notice in the case of a dissolution of the partnership by the acts of the parties, as ordinarily apply to the case of a retiring partner. Until due notice is given of the dissolution, each partner will remain liable for the acts and contracts of the others in relation to the partnership, so far as they respect persons who have previously dealt with the firm, or have known the names of the partners, or have given credit thereto; although not to mere strangers, who do not fall under the like predicament.[3] But very different considerations apply in the case of a dissolution of the partnership by mere operation of law, as by the death of a partner; for in such a case his estate is not bound or liable for any subsequent debts or contracts, entered into by the survivors of the firm.[4] This subject, however, will more properly come under review, when the effects of a dissolution by death come under consideration, and may therefore be here dismissed with this brief notice.

§ 163. There is another case, in which a retiring

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[1] But see Boyd *v.* McCann, 10 Md. R. 118.

[2] 3 Kent, Comm. Lect. 43, p. 67, 68.—I have followed almost the very words of Mr. Chancellor Kent, in his excellent Commentaries. See also, on the same subject, Collyer on Partn. B. 3, ch. 3, § 3, p. 368 to 371, 2d edit.; Gow on Partn. ch. 5, § 2, p. 248 to 251, 3d edit.; Watson on Partn. ch. 7, p. 384, 385, 2d edit.; 2 Bell, Comm. B. 7, p. 640 to 643, 5th edit.

[3] Ante, § 128, 129, 160; Gow on Partn. ch. 5, § 2, p. 248 to 251, 3d edit.; Collyer on Partn. B. 3, ch. 3, § 3, p. 368 to 375, 2d edit.; Id. B. 1, ch. 2, § 3, p. 75.

[4] 3 Kent, Comm. Lect. 43, p. 63, 4th edit.; Gow on Partn. ch. 5, § 2, p. 248, note; Id. ch. 5, § 4, p. 362, 3d edit.; Vulliamy *v.* Noble, 3 Meriv. R. 614; 3 Chitty on Comm. and Manuf. ch. 4, p. 250.

partner may, notwithstanding notice of his withdrawal, be responsible, not only for the past debts of the old firm, but for the new debts contracted by the new firm; and that is, in a case of positive or constructive fraud. This may take place, when, upon the actual insolvency of the firm, known to all the partners, they permit the retiring partner to withdraw a portion of the partnership funds out of the reach of the joint creditors of the new firm, for the purpose of cheating or defrauding the latter; for in such a case the fraud vitiates the whole transaction; and the retiring partner will be held liable to the full extent of all the funds so fraudulently withdrawn.[1] But the mere fact, that

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[1] Anderson v. Maltby, 2 Ves. Jr. 244; s. c. 4 Bro. Ch. R. 423; Collyer on Partn. B. 3, ch. 3, § 3, p. 400 to 404, 2d edit.— In this case Lord Loughborough said: "The case resolves itself into a plain question whether in 1784, upon the first of July, the defendant was *bonâ fide* a creditor of the other two then about to enter into a new partnership. If not, if all this transaction is to be void, under the color, in which it presents itself to me, it is an imposition, not upon them only, because they were consenting, but upon the creditors, who must deal with the partnership of the two contrived upon a certain foresight of bankruptcy at no very remote period, though the exact time was not certain, managed between persons of the same family, by which the creditors of the two have been losers exactly to the amount of what he has received. The only doubt I have is, whether I should better attain the justice of the case, by directing an account of all transactions between Brough and George Maltby from the commencement of their partnership, for it can go no further back, and the defendant, with an inquiry into the state of accounts at that period between them, to see, whether there was any consideration whatsoever, upon which he could be a creditor; for if it was all moonshine, and there was no property, upon which any account could be made out, it is all an imposition to create a false credit to themselves, and to give him the name of a creditor, when in fact he was none, and a mere device to draw the money of other people from the new copartnership into his pocket. Whether this should be done in the Master's office, or by discussion of an issue at law, is a point, upon which I doubt. Consider which will best attain justice. As to the last, it depends so much upon writing and accounts, that it will hardly come within the period, in which a trial at law can be had with advantage. I do not think it a case, in

a retiring partner knows at the time that the partnership is insolvent, will not of itself involve him in any liabilities for the new firm, or vitiate the dissolution, if it was without any intention of fraud, and entirely consistent in all its circumstances with good faith.[1]

§ 164. In joint-stock and other large companies, which are not incorporated, but are a simple, although an extensive partnership, their liabilities to third persons are generally governed by the same rules and principles, which regulate common commercial partnerships.[2] In such companies the fundamental articles generally divide the stock into shares, and make them transferable by assignment or delivery; and the whole business is conducted by a select board of trustees or directors. Without undertaking to assert in what cases such companies may or may not be deemed illegal, and the members liable to be treated as universally responsible, upon the ground of usurping and attempting to

which, if a trial can be had, I should be unwilling to have the assistance of a jury to decide it. But I would not let it go to an action, but certainly would direct an issue; for I must take care to have the true question tried exactly upon the merits in equity, which affect the real justice of the case, and not upon the points not relating to that, which would be made in an action. I agree with the defendant, that if any of these payments cannot be recovered at law, there would be no equity for it. There can be no difference between a court of law and of equity as to this. The true question for an issue would be, whether the partnership was indebted to the retiring partner on account of his share in the partnership."

[1] Collyer on Partn. B. 3, ch. 3, § 3, p. 400, 401, 402, 2d edit.; Parker v. Ramsbottom, 3 B. & Cresw. 257; Ex parte Peake, 1 Madd. R. 346; Gow on Partn. ch. 5, § 2, p. 237, 238, 3d edit.

[2] 3 Chitty on Comm. and Manuf. ch. 4, p. 226; Collyer on Partn. B. 5, ch. 1, § 1, p. 721 to 734, 2d edit.; 2 Bell, Comm. B. 7, ch. 2, § 2, p. 627 to 630. But see Powles v. Page, 3 Manning, Granger & Scott, R. 31. [In Irvine v. Forbes, 11 Barbour, 587, it was held that the members of a telegraph company, formed as a private association, were not partners, but tenants in common, and that the majority had no power to bind the minority, except by agreement.]

exercise the proper functions of a corporation, which the legislature or government is alone competent to establish;[1] it may well deserve inquiry, how far any stipulation in those articles, and which limit the responsibility of the members to the mere joint funds, or to a qualified extent, will be binding upon their creditors, who have notice of such a stipulation, and contract their debts with reference thereto. This question, many years ago, was presented to the Supreme Court of the United States; but the cause went off without any decision upon the point. It seems to have been thought, that such a stipulation can in no wise operate as a limitation of the general liability of all the partners for all their debts, even though the creditors have full notice thereof.[2] It may, however, be still deemed an open question, whether creditors, with such notice,

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[1] Collyer on Partn. B. 5, ch. 2, § 1, p. 730 to 734, 2d edit.; Joseph *v.* Pebrer, 3 Barn. & Cresw. 639; Blundell *v.* Winsor, 8 Sim. R. 601; Walburn *v.* Ingilby, 1 Mylne & Keen, 61, 76.

[2] See Blundell *v.* Winsor, 8 Sim. R. 601; Walburn *v.* Ingilby, 1 Mylne & Keen, 51, 76. — In this last case Lord Brougham said: "The clause intimating that each subscriber is only to be liable to the extent of his share, is not enough to make the association illegal. Such a regulation is wholly nugatory, indeed, as between the company and strangers, and can serve no purpose whatever, unless to give notice. In that light it is not to be viewed as criminal, or as a means of deception; for the publicity of it may tend to inform such as deal with the company, and a proof of that publicity in the neighborhood of parties so dealing might go to fix them with notice. For any other purpose, for the purpose of restricting the liability of the shareholders, it would plainly be of no avail; and whosoever became a subscriber upon the faith of the restricting clause, or of the limited responsibility, which that holds out, would have himself to blame, and be the victim of his ignorance of the known law of the land." This language does not seem necessarily addressed to a case, where the creditor contracts with a knowledge of the restrictive clause; but may be satisfied by referring it to cases, where no such knowledge exists. The Vice-Chancellor's decision, in 8 Sim. R. 601, is susceptible of a like interpretation. See Greenwood's case, 23 Eng. Law & Eq. R. 422; Hallet *v.* Dawdall, 9 Id. 347; Peel *v.* Thomas, 29 Id. 276.

can proceed against the members upon their general responsibility, as partners, where they have expressly contracted only to look to the social funds; and, whether, if they have notice of the qualifying stipulation, and contract with reference to it, it may not be easy to assign a reason, why it does not amount to an implied agreement to be bound by it, as much as if it were expressly agreed to. There is certainly nothing illegal in a creditor's agreeing to such a limited responsibility, as a qualification or condition of his contract; and in many other analogous cases contracts of this sort are deemed perfectly proper, and unexceptionable; as for example, where a commission merchant agrees to look exclusively to the goods for the reimbursement of his advances; or a mortgagee agrees to look exclusively to the mortgaged property for his debt. But a qualified agreement of this nature must be proved, and is never presumed without some reasonable proof thereof.

§ 165. The law of Scotland has recognized a distinction, grounded on these considerations, between the nature, character, and effect of such joint associations, and those of mere private partnerships; confining the responsibility of shareholders in such companies to the extent of three shares. This great question was tried about the middle of the last century, in the case of the Arran Fishing Company. The doctrine established in that case was this: That there is a clear distinction between the case of a joint-stock company, and that of a company trading without relation to a stock. That in the former case, the managers are liable for the debt, which they contract, while each partner is bound to make good his subscription. That there is no ground of further responsibility against the shareholders; nei-

ther on their contract, nor on any ground of mandate, beyond their share; the very meaning of confining the trade to a joint-stock being, that each shall be liable for what he subscribes, and no further. That in ordinary partnerships, there is a universal mandate and a joint *præpositura*, by which each partner is *institor* of the whole trade to an unlimited extent, each being liable *in solido* for the company debts.[1] In this respect the Scottish law seems to have followed the general doctrine of the Roman law, that in all partnerships each of the partners should be liable, not *in solido*, but only for his own share.[2] And this also is the general rule of the French law in all cases, except of partnerships for commercial purposes, where, upon grounds of public policy, each of the partners is held liable *in solido*.[3]

§ 166. We have thus far considered the liabilities and exemptions of partners in cases arising under contracts; and the inquiry next presented is, when, and under what circumstances, partners are liable for torts, done in the course of the partnership concerns, or by any one of the partners under color thereof. As to torts not committed in the course of the partnership business, it is very clear, that the partnership is not liable therefor in its social character, unless indeed they are assented to or adopted as the act of the partnership. But torts may arise in the course of the business of the partnership, for which all the partners will be liable, although the act may not in fact have been assented to by all the partners.[4] Thus, for example, if one of the

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[1] 2 Bell, Comm. B. 7, p. 627, 628, 5th edit.

[2] Dig. Lib. 45, tit. 2, l. 11, § 1, 2.

[3] Pothier, de Societé, n. 96, 103, 104.

[4] Collyer on Partn. B. 3, ch. 1, § 6, p. 305 to 307, 2d edit.; Gow on Partn.

partners should commit a fraud in the course of the partnership business, all the partners will be liable therefor, although they have not all concurred in the act.[1] So, if one of a firm of commission merchants should sell goods, consigned to the partnership, fraudulently, or in violation of instructions, all the partners would be liable for the conversion in an act of trover.[2] So, if one of a firm, who are common carriers, should unlawfully convert the goods intrusted to the firm for carriage, or should negligently lose or injure them, all the partners would, or might be held liable in tort therefor.[3] The same doctrine would apply to a conversion or loss by the negligence or fraud of an agent of the firm.[4] So, if partners own a ship, and by the negligence of the master, goods, shipped on board on freight, are negligently injured or lost; or another ship is by such negligence injured by a collision with her, the partners will be liable for the loss.[5] For in all such cases the maxim applies: *Qui facit per alium, facit per se;* and the master in such a case acts not only personally, but as

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ch. 4, § 1, p. 160, 161, 3d edit.; Ex parte Eyre, 3 Montagu, Deacon & De Gex, R. 12; Stockton *v.* Frey, 4 Gill, 406.

[1] Collyer on Partn. B. 3, ch. 1, § 5, p. 296, 297; Id. B. 3, ch. 1, § 6, p. 305 to 307, 2d edit.; Gow on Partn. ch. 4, § 1, p. 160, 161, 3d edit. See Rapp *v.* Latham, 2 Barn. & Ald. 795; Stone *v.* Marsh, 6 B. & Cresw. 551; Kilby *v.* Wilson, Ryan & Mood. 179.

[2] Collyer on Partn. B. 3, ch. 1, § 6, p. 305, 306, 2d edit.; Nicoll *v.* Glennie, 1 Maule & Selw. 588.

[3] Gow on Partn. ch. 4, § 1, p. 160, 161, 3d edit.; Collyer on Partn. B. 3, ch. 1, § 1, p. 305, 306, 2d edit.; Moreton *v.* Hardern, 4 Barn. & Cresw. 223.

[4] Collyer on Partn. B. 3, ch. 1, § 5, p. 296, 297, 2d edit.; Id. B. 3, ch. 1, § 6, p. 305, 306; Id. B. 3, ch. 6, § 5, p. 505; Id. § 7, p. 527.

[5] Gow on Partn. ch. 4, § 1, p. 160, 3d edit.; Collyer on Partn. B. 3, ch. 1, § 6, p. 305 to 307, 2d edit.; Mitchell *v.* Tarbutt, 5 Term R. 649; Morley *v.* Gaisford, 2 H. Black. 242; Moreton *v.* Hardern, 4 Barn. & Cresw. 222.

the agent or *præpositus* of the entire firm.[1] The doctrine has been carried further; and the partnership has been held liable for a libel, which was published and sold by one partner in the course of the business of the firm, as, for example, by a printer or bookseller, one of the firm in that business.[2] The same rule might apply to cases of written slander, as by declaring a rival merchant a bankrupt, or a cheat, if written in the name, and as the act of the firm. So, if breaches of the revenue laws by fraudulent importations, or smuggling, or entries at the custom-house are committed by one of the firm in the course of the business thereof, all the firm would be liable penally, as well as civilly, therefor.[3]

§ 167. But, in all cases of this sort, although the partners are jointly liable as wrongdoers, it by no means follows, that they must all be sued. On the contrary, as the law treats all torts as several, as well as joint, the party injured may, at his election, either sue all the partners, or any one or more of them for the tort; and it will constitute no objection, that his partners were also concerned in it.[4] This is a rule by

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[1] Gow on Partn. ch. 4, § 1, p. 160, 3d edit.; Collyer on Partn. B. 3, ch. 1, § 6, p. 305, 3d edit.; Lloyd *v.* Bellis, 37 Eng. Law & Eq. R. 546; Watson on Partn. ch. 4, p. 235, 2d edit.

[2] Watson on Partn. ch. 4, p. 241, 2d edit.; Rex *v.* Almon, 5 Burr. R. 2686; Collyer on Partn. B. 3, ch. 1, § 6, p. 306, 2d edit.; Gow on Partn. ch. 4, § 1, p. 161, 3d edit.; Rex *v.* Pearce, Peake's R. 75; Rex *v.* Topham, 4 Term R. 426; Rex *v.* Marsh, 2 Barn. & Cresw. 723; Rex *v.* Stannyworth, Bunb. R. 97.

[3] Collyer on Partn. B. 3, ch. 1, § 6, p. 306 to 308, 2d edit.; Gow on Partn. ch. 4, § 1, p. 161, 3d edit.; Attor. General *v.* Burges, Bunb. R. 223.

[4] Collyer on Partn. B. 3, ch. 1, § 6, p. 306, 307, 2d edit.; Id. B. 3, ch. 6, § 3, p. 505; Id. p. 527; Gow on Partn. ch. 4, § 1, p. 160, 161, 3d edit.; Edmondson *v.* Davis, 4 Esp. R. 14; Attor. General *v.* Burges, Bunb. R. 223; Watson on Partn. ch. 4, p. 235, 2d edit.

no means peculiar to partnerships; but it extends to all cases of joint torts and trespasses at the common law, whether positive or constructive.

§ 168. From what has been already suggested, it is obvious, that a tort committed by one partner, or by any other agent of the partnership, will not bind the partnership, unless it be either authorized, or adopted by the firm, or be within the proper scope and business of the partnership. And, as in either way, partners may thus all be affected by the tort of one partner, so also a discharge or release of one, on account of the tort, will amount to a discharge or release of all the other partners. This, again, is the result of a general rule of the common law, applicable to all cases of joint torts and trespasses; and has been recognized from the earliest times.[1]

[§ 168 *a*. The distinction between the liability of the firm, and of an individual partner for a tortious act, committed by one partner on property in the custody of the firm, is illustrated by a recent English decision. Thus; a customer deposited a box containing various securities with his bankers for safe custody, and afterwards granted a loan of a portion of such securities to one of the other partners in the banking-house, for his own private purposes, upon his depositing in the box certain railway shares, to secure the replacing of the securities. This partner afterwards for his own purposes, and without the knowledge of the customer, subtracted the railway shares, and substituted others of a less value. It was held, that, as the proceeds of the railway shares were not applied to the use of the

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[1] Co. Litt. 232, a; Bac. Abridg. *Release* (G); Com. Dig. *Release*, B. 4; Id. *Pleader*, 3 M. 12; Kiffin *v.* Willis, 4 Mod. R. 379.

partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit, nor for any loss occasioned by this subtraction of the shares, on the ground of negligence.[1]]

§ 168 *b*. In respect to what acts of one partner the others will and ought to be held to have notice, so as to bind them all by implied consent or acquiescence, it may be laid down as a general rule, for the protection of those who deal with partners, that all of the partners have such knowledge and notice of the acts of any of their partners relative to their business, as in discharge of their plain duty they might or ought to have obtained.[2]

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[1] Ex parte Eyre, 3 Montagu, Deacon & De Gex, R. 12. [See another instance in Coomer *v.* Bromley, 12 Eng. Law & Eq. R. 307, where Blair *v.* Bromley, 2 Ph. 354, is commented upon, and distinguished.]

[2] Sadler *v.* Lee, 6 Beavan, R. 324.

CHAPTER IX.

RIGHTS, DUTIES, AND OBLIGATIONS OF PARTNERS BETWEEN THEMSELVES.

§ 169. We come, in the next place, to the consideration of the rights, duties, and obligations of partners between themselves. And here it may be stated, that as the contract itself has its solid foundation in the mutual respect, confidence, and belief in the entire integrity of each partner, and his sincere devotion to the business and true interests of the partnership; good faith, reasonable skill and diligence, and the exercise of sound judgment and discretion, are naturally, if not necessarily, implied from the very nature and character of the relation of partnership. In this respect, the same doctrine applies, which ordinarily applies to the cases of mandataries or agents for hire;[1] and to other cases of bailment for the mutual benefit of both parties. Hence, if the partnership suffers any loss from the gross negligence, unskilfulness, fraud, or wanton misconduct of any partner in the course of the partnership business, he will ordinarily be responsible over to the other partners for all the losses, and injuries, and damages sustained thereby, whether directly, or through their own liability to third persons.[2] Of course all losses, injuries, and damages sustained by the partnership from the positive breach of the stipulations

[1] Story on Agency, § 182 to 189; Story on Bailm. § 421, 455.
[2] Ibid.

contained in the articles of partnership, on the part of any partner, are to be borne exclusively by that partner, and he must respond over to them therefor.

§ 170. This is the dictate of common sense and justice; and it has been expressly affirmed by the Roman law. In relation to third persons, that law declares, that partners are liable, not only for fraud, but for negligence as well as fraud. Thus, in one place, after enumerating other contracts, it is said: *Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in Societate, et dolus, et culpa præstatur.*[1] As between the partners themselves, the like redress was also given. *Si quid dolo nostro socius damni ceperit, a nobis repetet.*[2] *Venit autem in hoc judicium pro socio bona fides.* And again: *Utrum ergo tantum dolum, an etiam culpam præstare socium oporteat, quæritur? Celsus ita scripsit. Socios inter se dolum et culpam præstare oportet. Si in coëundâ societate (inquit) artem operamve pollicitus est alter, &c., nimirum ibi etiam culpa præstanda est. Quod, si rei communis nocuit, magis admittit, culpam quoque venire.*[3] Again: *Socius pro socio etiam culpæ minime tenetur, id est, disidiæ atque negligentiæ.*[4] Again: *Si quis societatem ad emendum coierint, deinde res alterius dolo vel culpâ non empta sit, pro socio esse actionem constat.*[5] But it is added: *Damna, quæ imprudentibus accidunt, hoc est, damna fatalia, socii non coguntur præstare.*[6] And the

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[1] Dig. Lib. 13, tit. 6, l. 5, § 2; Pothier, Pand. Lib. 13, tit. 6, n. 12; Story on Agency, § 182, 183; Pothier, Pand. Lib. 17, tit. 2, n. 27.

[2] Dig. Lib. 17, tit. 2, l. 59, § 1; Id. l. 52, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 36; 1 Domat, B. 1, tit. 8, § 4, art. 3, 4, 7, 8.

[3] Dig. Lib. 17, tit. 2, l. 52, § 2; Pothier, Pand. Lib. 17, tit. 2, n. 36.

[4] Dig. Lib. 17, tit. 2, l. 52, § 11; Pothier, Pand. Lib. 17, tit. 2, n. 36.

[5] Dig. Lib. 17, tit. 2, l. 52, § 11; Pothier, Pand. Lib. 17, tit. 2, n. 36.

[6] Dig. Lib. 17, tit. 2, l. 52, § 3; Pothier, Pand. Lib. 17, tit. 2, n. 36; 1 Domat, B. 1, tit. 8, § 4, art. 3, 4.

general principle, which runs through the whole matter, is summed up in the following expressive words. *Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit etenim, talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet; quia, qui parum diligentem sibi socium adquirit, de se quæri debet.*[1] It would, perhaps, have been more exact to say, that in cases of partnership the same diligence is ordinarily required of each partner, as reasonable and prudent men generally employ about the like business; unless the circumstances of the particular case repel such a conclusion.[2]

§ 171. The same doctrine runs through the whole structure of the French law on the same subject.[3] Pothier even presses it to a somewhat further extent, in which he also follows the Roman law, holding, that a partner cannot absolve himself from losses, occasioned by his fault and negligence in one business, by placing, in opposition to such claim, as a compensation, the profits, which he has brought to the partnership by his industry and diligence in other business of the firm. The reason he affirms to be, that the partner, who thus exerts his industry and diligence, does no more than his duty thereto; and therefore the firm is not indebted to him on that account.[4] *Non ob eam rem minus ad periculum socii pertinet, quod negligentiâ ejus periisset, quod in plerisque aliis industriâ ejus societas aucta fuisset. Et ideo, si socius quædam negligenter in societate egisset, in plerisque autem societatem auxisset, non compensatur com-*

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[1] Dig. Lib. 17, tit. 2, l. 72; Pothier, Pand. Lib. 17, tit. 2, n. 36; 1 Domat, B. 1, tit. 8, § 4, art. 2, 3, 7, 8.

[2] Story on Agency, § 182 to 185; Story on Bailm. § 11, 13, 14, 15, 18; Id. § 455; Jones on Bailm. p. 98; Pothier, De Societé, n. 124.

[3] Pothier, De Societé, n. 124, 125.

[4] Pothier, De Societé, n. 125.

pendium cum negligentiâ.[1] The doctrine, thus stated, although somewhat strict and austere, may perhaps be deemed salutary and convenient, as creating a deep interest in partners to perform all their duties with fidelity and diligence. It does not, however, seem to have been held applicable to a series of connected acts, all of which form a part of the same entire business transaction, such, for example, as the sale of a cargo of goods by one partner, who manages the whole sale, where, although there may be some negligence, as to the sale of a part, by which some loss has been incurred, yet there has been a great profit upon other parts; so that the loss is much more than compensated for by the extra rate of profits.

§ 172. The necessity of entire good faith, and of the absence of fraud on the part of partners towards each other, is inculcated by Cicero in terms of deep import and sound morality. *In rebus minoribus socium fallere, turpissimum est; neque injuriâ; propterea quod auxilium sibi se putat adjunxisse, qui cum altero rem communicavit. Ad cujus igitur fidem con fugiet, cum per ejus fidem læditur, cui se commiserit? Atque ea sunt animadvertenda peccata, maxime, quæ difficillime præcaventur. Tecti esse ad alienos possumus; intimi multa apertiora videant necesse est. Socium vero cavere quî possumus? Quem etiam si metuimus, jus officii lædimus. Recte igitur majores eum, qui socium fefellisset, in virorum bonorum numero non putârunt haberi oportere.*[2] The Roman law has also expressed the obligation of good faith in exceedingly strong language. *In*

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[1] Dig. Lib. 17, tit. 2, l. 25, 26; Pothier, Pand. Lib. 17, tit. 2, n. 29; 1 Domat, B. 1, tit. 8, § 4, art. 8.

[2] Cicero, Pro Roscio. Amer. ch. 11, cited by Pufendorf, B. 5, ch. 8, § 4 and by Collyer on Partn. B. 2, ch. 2, p. 117, 2d edit.

societatis contractibus fides exuberet.[1] Good faith not only requires, that every partner should not make any false representation to his partners, but also that he should abstain from all concealments, which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts of the concern, had agreed to purchase the share of his copartners in the business for a sum, which he knew, from the accounts in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity, as a constructive fraud; for he could not in fairness deal with the other partners for their share of the profits of the concern without putting them in possession of all the information, which he himself had with respect to the state of the accounts and the value of the concern.[2]

§ 173. One of the most obvious duties and obligations of all the partners is, strictly, to conform themselves to all the stipulations contained in the partnership articles;[3] and also to keep within the bounds and limitations of the rights, powers, authorities, and acts, belonging and appropriate to the due discharge of the partnership trade or business. Of course, every known deviation from, and every excess in the exercise of such rights, powers, authorities, and acts, which produce any loss or injury to the partner-

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1 Cod. Lib. 4, tit. 37, l. 3; 1 Domat, B. 1, tit. 8, § 4, art. 1, 2.

2 Maddeford v. Austwick, 1 Sim. R. 89.

3 Collyer on Partn. B. 2, ch. 2, § 2, p. 131 to 161, 2d edit.

ship, are to that extent to be borne by the partner, who causes or occasions the loss or injury, and he is bound to indemnify the other partners therefor.[1] The

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[1] The doctrine here stated is sometimes of great practical importance in the settlement of partnership accounts. An illustration of it occurred in the case of Stoughton *v.* Lynch (1 Johns. Ch. R. 467), as to funds, which one partner had withdrawn from the partnership contrary to the articles. On that occasion, Mr. Chancellor Kent said: "The articles of copartnership intended to preserve, in a state of progressive accumulation, the funds of the house; and the clause, upon which the question before me has arisen, is to be taken strictly. This is evidently the sense and spirit of the agreement. It is expressly stipulated, that the capital and profits of the company were to remain in the house, and to be employed for the benefit of the concern, during the partnership, with this special exception, that such part only was to be withdrawn, as might be necessary for private expenses. And to show the care, with which the parties guarded the funds from being diverted by either of them, it was further stipulated, that neither of them was to do business at New York on their private account, nor lend any of the capital stock, or enter into acceptances; but each party was to do his best to promote the advantage of the company. After reading these articles, it is impossible not to view most of the charges, which the defendant wishes to include under the special exception, as palpably inadmissible. To consider plate, musical instruments, carriages and horses, and the whole furniture of a house, as coming within the permission granted to the parties to withdraw the funds of the house only when necessary for private expenses, is, in my judgment, an unreasonable and extravagant pretension. The object of the decretal order, of last July, was, not to exempt from interest all those moneys withdrawn, that were not supposed to be employed in land speculations. I then observed, that, if the funds so withdrawn had been employed in trade, the party would have had to account, not merely for interest, but for the profits of that trade; and we find authority for this in Brown *v.* Litton (1 P. Wms. 140), and in Crawshay *v.* Collins (15 Ves. 218), where the principle is stated, that if one partner trade alone on a joint stock, he shall divide the profits. The least that I could do in this case was to make him pay interest on all moneys withdrawn beyond the private necessity expressed in the contract. The interest of the parties as joint traders, the obvious policy and meaning of the contract, and that good faith, which is the animating principle in all mercantile associations, unitedly concur in recommending us to view the claims set up by either party, under the exception, with a jealous and scrupulous eye. Without such a rule of construction, a partnership, like the present, with all its provisions to pre-

same doctrine is recognized by Pothier, as existing in the French law;[1] and it seems, indeed, so clearly the result of natural justice, as to require no particular exposition.[2]

§ 174. But there are many implied duties and obligations of an equally important, although not perhaps always of so obvious, a nature. Thus, for example, it is a violation of good faith, for any partner, in conducting the partnership business, to stipulate clandestinely with third persons for any private and selfish advantage and benefit to himself, exclusive of the partnership; for all the partnership property and partnership con-

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serve the funds of the house untouched, might soon languish under the carelessness, or dissipation, or discordant and rival views, of either of the contracting parties. The parties, then, had in view, that funds were to be withdrawn only when necessary for private expenses; and when at any time withdrawn, the party must have done it with a view to that necessity. That must have been the purpose, for which they were withdrawn. The more safe and regular way would have been, to have stated, in each case, the object of the appropriation, so that each party, at the end of every year, when a fair balance of the books, according so the articles, was to be made, signed, and approved, might have known and judged of the requisite appropriation. But it would, perhaps, be too rigorous to require the production of such an original entry to justify every such appropriation; and I am willing even to presume, that a fair and reasonable sum, drawn away in each year, was necessary for the private expenses of each individual partner during that year. Beyond this presumption I cannot go. All the European expenses of the defendant are, therefore, to be laid out of the case; because, as I understand from the suggestions of the counsel upon the argument, there was no concurrent, or any thing like contemporary, appropriations, or drafts, with any presumed reference to those expenses. I am to presume, then, and I do presume and believe, that the defendant never deemed it necessary, at the time, to recur to the permission granted under these articles, to meet and defray those expenses. The idea of including them under this article was an after thought, arising many years after those expenses had been borne and forgotten."

[1] Pothier, De Sociètè, n. 133.

[2] Pothier, Pand. Lib. 17, tit. 2, n. 36; 1 Domat, B. 1, tit. 8, § 4, art. 3, 4, 7.

tracts should be managed for the equal benefit of all partners, according to their respective interests and shares therein.[1] If, therefore, any one partner should so stipulate clandestinely for any private advantage or benefit to himself, to the disadvantage, or in fraud of his partners, he will in equity be compelled to divide such gains with them.[2] The same principle will apply to clandestine bargains for his own private advantage and benefit, made in contemplation of establishing a partnership with other persons, and as a premium for his services therein.[3] So, if a purchase is made on the partnership account by one partner, who clandestinely stipulates and receives any reward or allowance from the seller, for his own private profit, he will be compelled to share the same with his partners.[4] So, where one partner obtains the renewal of a partnership lease secretly in his own name, he will be held a trustee for the firm in the renewed lease.[5]

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[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 117 to 120, 2d edit.; 3 Kent, Comm. Lect. 43, p. 51, 4th edit.

[2] Ibid.; Russell *v.* Austwick, 1 Sim. R. 52.

[3] Fawcett *v.* Whitehouse, 1 Russ. & Mylne, 132, 148, 149; Hickens *v.* Congreve, 4 Russ. R. 562.

[4] Carter *v.* Horne, 1 Eq. Cas. Abridg. *Account*, A. pl. 13.

[5] Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Hitchens *v.* Congreve, 1 Russ. & Mylne, 150, note B.; s. c. 4 Russ. R. 562; Collyer on Partn. B. 2, ch. 2, § 1, p. 120, 121, 2d edit.; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68, 69, 70. But see Anderson *v.* Lemon, 4 Sandf. 552. — Lord Eldon in Featherstonhaugh *v.* Fenwick (17 Ves. 311), said: "It is clear, that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained. Consider, what an unreasonable advantage one partner would, upon a different principle, obtain over the rest. In this respect, there can be no distinction, whether the partnership is for a definite, or indefinite period. If one partner might so act in the latter case, he might equally in

§ 175. The same doctrine is applied to other analogous cases. In all purchases and sales, made on account of the partnership, every partner is bound to act expressly for the benefit of the partnership; and, there-

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the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners: 'The premises, on which we carried on our trade, have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on the trade here.' Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given; nor had the plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal to the partnership arose solely from the indisposition of Mr. Wilkinson to any connection with the plaintiff; as, before any objection had been made on that or any other ground, the defendant goes with the intention, and for the direct purpose, of obtaining a renewal for himself and his son exclusively. He makes the application to Murray; who says, the proposal was for a renewal for the benefit of the defendants; expressly excluding the plaintiff, with whom it was represented, that George Fenwick was determined to have no further connection in trade; and though it may be true, that Wilkinson afterwards said, he would not have granted a lease to the defendants jointly with the plaintiff, that declaration had become quite unnecessary, by the resolution, previously expressed by the defendant, not to take a lease jointly with him. This clandestine conduct was very unfair towards the plaintiff. The defendants had not intimated to him, that they would not have any further connection with him, and that they intended to apply for a lease on their own account. They ought first to have given him notice, and to have placed him on equal terms with them; and then, if Mr. Wilkinson had thought proper to give them the preference, the case might admit of a different consideration. Instead of that they clandestinely obtained an advantage, which would enable them to dissolve the partnership on terms very unfavorable to the plaintiff; and they evidently had that object in view. If they can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away, and seek some place, in which to put it, as to the defendants, who were to continue it in the place where the trade was already established; and if the stock was sold, the same circumstance would give them an advantage over other bidders. In effect they would have secured the good-will of the trade to themselves, in exclusion of their partner."

fore, he has no right, and cannot consistently with his duty, voluntarily place himself in a situation, in which his bias, as well as his interest, is in opposition to the interest of the partnership. Thus, if a partner buys goods for the partnership account, and makes the bargain by a barter of his own private goods on his own sole account, and charges the partnership with the full cash value and price of the goods, as if they were bought for cash; it will be a constructive fraud upon the partnership; and he will be compelled in equity to account for any private profit, so made in the barter.[1] The same rule will apply to the converse case of a sale of the partnership property under the like circumstances; for the general doctrine is, that there is an implied obligation between partners, that they are to use the partnership property for the benefit thereof, and not otherwise.[2]

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[1] Burton *v.* Wookey, 6 Madd. R. 367; Collyer on Partn. B. 2, ch. 2, § 1, p. 122, 2d edit. — On this occasion Sir John Leach (the Vice-Chancellor) said: "It is a maxim of the courts of equity, that a person, who stands in the relation of trust or confidence to another, shall not be permitted, in pursuit of his private advantage, to place himself in a situation, which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in relation of trust or confidence towards the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when, in the place of purchasing the *lapis calaminaris*, he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit, which he derived from the dealing in store goods; and as this profit belonged to him individually, and as the saving by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the plaintiff. I must, therefore, decree an account of the profit made by the defendant in his barter of goods, and must declare, that the plaintiff is entitled to an equal division of that profit with the defendant." 6 Madd. R. 367.

[2] Crawshay *v.* Collins, 15 Ves. 218, 227.

§ 176. This wholesome principle of justice has been adopted in many other cases, where peculiar relations exist between the parties, by courts of equity.[1] Pothier has directly applied it, not only to cases of bargains during the partnership,[2] but also to a case, where a partner contemplates a dissolution solely to aid his own sinister and selfish purposes. In order (says he) to enable a partner to dissolve a partnership, two things must concur; (1.) the renunciation of the partnership must be made in good faith; (2.) it must not be made at an unreasonable time (*contre temps*). *Debet esse facta bonâ fide et tempestivè.* The renunciation is not made in good faith, when the partner renounces to appropriate to himself alone the profits, which the other partners proposed for the partnership, when it was formed.[3] This is the very doctrine inculcated by courts of equity under the like circumstances.[4] It is also the doctrine of the Roman law. *Si societatem ineamus ad aliquam rem emendam; deinde solus volueris eam emere, ideoque renuntiaveris societati, ut solus emeres; teneberis quanti interest mea. Sed si ideo renuntiaveris, quia emptio tibi displicebat, non tenebéris quamvis ego emero; quia hic nulla fraus est.*[5]

§ 177. Upon similar grounds it is the implied obligation and duty of every partner, not to engage in any other business or speculation, which must necessarily deprive the partnership of a portion of the skill, indus-

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[1] 1 Story, Eq. Jurisp. § 315, 316, 321; Id. § 221; 2 Story, Eq. Jusrisp. § 1261, 1265; Stoughton *v.* Lynch, 1 Johns. Ch. R. 470.

[2] Pothier, De Societé, n. 59.

[3] Pothier, De Societé, n. 150.

[4] Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

[5] Dig. Lib. 17, tit. 2, l. 65, § 4; Pothier, Pand. Lib. 17, tit. 2, n. 64; 1 Domat, B. 1, tit. 8, § 4, art. 5, 17.

try, diligence, or capital, which he is bound to employ therein.[1] In other words, he is not at liberty to deal on his own private account in any matter or business, which is obviously at variance with, or adverse to, the business or interest of the partnership. The object of this prohibitory rule is, to withdraw from each partner the temptation to bestow more attention, and to exercise a sharper sagacity in respect to his own purchases, and sales, and negotiations, than he does in respect to the concerns of the partnership, in the same or in a conflicting line of business.[2] It is, therefore, a rule founded in the soundest policy. Pothier lays down the same rule, and inculcates it in emphatic language, insisting that no partner has a right to prefer his own particular interest to that of the firm, or to take away the profits of a bargain from the firm, and appropriate them to his own private advantage.[3] Boulay Paty is equally expressive on the same subject; and he applies it, as well to cases of masters of ships, as to partners.[4]

§ 178. If, therefore, one partner should clandestinely carry on another trade, or the same trade for his own private advantage, and in a manner injurious to the true interests of the partnership, or should divert the capital or funds of the partnership to such secret and sinister purposes, he will be compelled in equity to account for all the profits made thereby.[5] So, if one

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[1] 3 Kent, Comm. Lect. 43, p. 51, 4th edit.; Burton v. Wookey, 6 Madd. R. 367.

[2] 3 Kent, Comm. Lect. 43, p. 51, 4th edit.

[3] Pothier, De Societé, n. 59.

[4] Boulay Paty, Droit Comm. Tom. 2, § 19, p. 94.

[5] Long v. Majestre, 1 Johns. Ch. R. 305; Glassington v. Thwaites, 1 Sim. & Stu. R. 124, 133; 3 Kent, Comm. Lect. 43, p. 51, 4th edit.; Bur-

partner should purchase articles upon his own private account in some special trade and business, in which the partnership was engaged, and injuriously to the partnership, as for example, by purchasing *lapis calaminaris* of neighboring miners, on his own private account, that being also the business of the partnership, he would be held to account for the profits made thereby.[1] Indeed courts of equity will go further in cases of this sort, and restrain the partner by injunction from carrying on any trade or business, which is thus inconsistent with the rights and interests of the partnership; for (as has been well remarked) the principles of courts of equity will not permit, that parties, bound to each other, by an express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gives them a direct interest adverse to that undertaking.[2] But if there be no such necessary conflict or incompatibility of interests, the mere circumstance, that the partner may thereby be exposed to the temptation to be dishonest, or to abuse his trust, or to betray his duty, has not been thought sufficient to justify courts of equity in imposing such restraint by injunction.[3]

§ 179. The principle and the exception may readily be illustrated by the case of two rival morning newspapers, and two evening newspapers. All newspapers are, to some extent, rivals; and there is also neces-

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ton *v.* Wookey, 6 Madd. R. 367; Stoughton *v.* Lynch, 1 Johns. Ch. R. 467, 470.

[1] Burton *v.* Wookey, 6 Madd. R. 367.

[2] Glassington *v.* Thwaites, 1 Sim. & Stu. 124, 133.

[3] Glassington *v.* Thwaites, 1 Sim. & Stu. 124, 133.

sarily some degree of rivalry between a morning and an evening paper, especially in the country. The question may, therefore, very properly arise in many cases, whether a person, engaged as a partner in the management of a morning paper, is at liberty to assist with his skill, labor, and property, the publication of an evening newspaper, which may affect the interests of the former. If both papers are published in the same city, for the like general circulation, it will be difficult to escape the conclusion, that the interest in the one is adverse to and in conflict with that of the other. But, if one is published in another city, or one is designed mainly for city circulation, and the other exclusively for country circulation, or the one is a daily, and the other a weekly paper, the same conflict and adversary interests may not arise; and the nature and objects of the particular papers, as well as the habits and usages of the trade, may furnish material ingredients for a distinction between the cases.[1]

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[1] Glassington v. Thwaites, 1 Sim. & Stu. 124, 131, 133. — On this occasion Sir John Leach (the Vice-Chancellor) said: "All newspapers are to some extent rivals. The competition is more immediate between two morning papers and two evening papers; but there is necessarily some degree of rivalry between a morning and an evening paper, especially in the country. It might, therefore, have been made a question, whether it would be a due act of management in the partnership concern of a morning paper, to assist with its property and its labor the publication of any other newspaper, so as to enable the majority of the partners in that respect to bind the minority. But the question does not arise; because the plaintiff himself is to be considered as a party to the practice, before his copartners became the proprietors of the evening paper; and because there is evidence, that the proprietors of other morning papers have adopted the same practice with respect to other evening papers, so as to form a sort of usage in the trade to this effect. And it is to be considered, that the annual sum, paid by the evening paper for the accommodation afforded to it, outweighs the danger of increased competition. The true question here is, whether it makes any difference, that the other proprietors of the Her-

§ 180. Cases of a very delicate and embarrassing nature sometimes arise in cases of partnership, where one partner dies, and one or all of the survivors are appointed his executors, and the partnership is continued as between the survivors. Under such circum-

ald have now become the proprietors of the evening paper; and I think it does not make a material difference. It is true, that a considerable part of the expense of a newspaper is occasioned by procuring information; and if some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which parties may protect themselves by their contracts; and accordingly, it is a common covenant in such partnership articles, that no partner shall be the proprietor of any other newspaper. In the present case, there is actually a covenant, that the proprietors will not be concerned in any other morning paper, which, by implication, affords the conclusion, that it was the intention of the parties, that they might engage in the concern of any evening paper. Where there is no such covenant of restraint, it is clear, that, at law, a partner in one newspaper may be a proprietor in any other newspaper; and in this case, equity must follow law; and it cannot be intended, that the parties meant to impose a restraint, which they might have expressed, and have not expressed, and where it is plain their attention was directed to the subject. The principles of courts of equity would not permit, that parties, bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking. But the argument here is, not that the defendants, by becoming the proprietors of the evening paper, place themselves in a situation, in which they are necessarily required to betray their duty to the morning paper; but that, if their interest be greater in the evening paper than the morning paper, they are exposed to a temptation to be dishonest and to betray their duty to the morning paper. If they act honestly, it is immaterial to the morning paper, whether the defendants are or not the proprietors of the evening paper. And for this reason it is, that it makes no difference in the present case, that the defendants have become the proprietors of the evening paper."

stances, it may be difficult to say, that there may not sometimes arise conflicting duties and obligations in their different acts and characters, as partners and as executors. Still greater embarrassments may occur, where the executors also sustain the character of guardians of the children of the testator, who by the articles have a right upon arriving at their majority to come into the firm. It has been well remarked by a learned writer, that it is clear, that surviving partners so situated, have inconsistent duties to perform. It is true, that the difficulties of this situation are not so obvious, where the parties claiming under the testator are all *sui juris*, as where some of them are infants. But even in the former case, the surviving partner cannot, without the full knowledge and consent of these parties, make his situation of executor a means of advantage to his copartnership; and in the latter case, the difficulties, in the absence of specific contract, seem to be insuperable, unless the whole partnership concern be wound up, or recourse be had to a court of equity.[1]

[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 123, 2d edit.; Id. B. 2, ch. 3, § 4, p. 210, 211. — The case of Wedderburn *v.* Wedderburn (2 Keen, R. 722; s. c. 4 M. & Craig. R. 41), demonstrates the truth of these remarks. In that case the accounts of successive partnerships and retirements of partners, after the death of the first partner (the testator), were overhauled in equity, after a lapse of thirty years from the testator's death. The decretal order in that case contains the form of the proper order to be made in such cases, and may serve as a valuable precedent. (2 Keen, R. 752, 753.) This case was affirmed upon the appeal by Lord Cottenham, who then used the following language. "I have had many occasions to consider, and have frequently expressed my sense of the difficulties, which the court has to encounter in administering equity according to its acknowledged principles in cases of this description. So many decisions have established the right of parties to participate in the profits of trade, carried on under circumstances similar to the present, that no question can be raised as to the duty of the court in decreeing such relief, when a

§ 181. In the next place, there is an implied obligation and duty upon all the partners, as a matter of good faith, to which they are mutually pledged to each other, that the business of the partnership shall be conducted in such a manner, as that each of the partners may be enabled to see, that it is carrying on for their mutual advantage, and not injuriously to the common interest.[1] It seems, therefore, the proper duty of each partner to keep precise accounts of all his own transactions for the firm, and to have them always ready for inspection and explanation.[2] And if one partner receives any moneys for the partnership, he ought at once to enter the receipt thereof in the books of the firm, so that the same may be open to the inspection of all the partners.[3] This, indeed, is one of

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proper case arises for it; but it is obvious, that very great difficulties exist in enforcing this right. Great expense, great delay, and great hardship upon the defendants frequently attend the prosecution of decrees for this purpose, and the apparent benefit decreed to the plaintiff is frequently much diminished, if not lost, in the attempt to enforce it. For these reasons it appears to me, that these are cases, in which, above all others, it is for the interest of all parties to settle the matters in contest between them by private arrangement and compromise; and I earnestly recommend to the parties to take this into their serious consideration. I have no doubt but that a settlement might be effected, which would secure to the plaintiffs more than they can possibly obtain from the most successful prosecution of the decree, and which would, at the same time, protect the defendants against much of the expense, inconvenience, and hardship, to which they must be exposed if it be adversely prosecuted. This, however, is entirely for their private consideration. My duty is only to dispose of the matters litigated upon this appeal, which, for the reasons I have before given, I now do by dismissing the appeal with costs." 4 Mylne & Craig. 55.

[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 126, 2d edit.; Peacock *v.* Peacock, 16 Ves. 49, 51; 3 Chitty on Comm. & Manuf. ch. 4, p. 236.

[2] Collyer on Partn. B. 2, ch. 2, § 1, p. 121, 126, 2d edit.; Id. B. 2, ch. 2, § 2, p. 142; Rowe *v.* Wood, 2 Jac. & Walk. 553, 558; Ex parte Yonge, 3 Ves. & B. 36.

[3] Goodman *v.* Whitcomb, 1 Jac. & Walk. 569, 573.

the ordinary stipulations of partnership articles; but it is a mere affirmance of the general doctrine of the law.[1] It follows from these considerations, that one partner cannot exclude another from a personal interposition, and an equal management in the concerns of the partnership. The powers of all are in this respect coördinate and coextensive, whether the partnership be in full operation, or be subsisting only for the purpose of winding up the affairs thereof.[2] There may be exceptions and limitations growing out of the particular articles or other incidents of the partnership, as where one partner has sole authority to act in the management of the concern; or where one partner is the sole owner of the property, and the other partners are only to share the profits.[3] The Roman law inculcated a similar doctrine; and if one partner was prevented by the others from an equal participation in any of the partnership property, he might, even during the continuance thereof, maintain an action *pro socio*.[4]

§ 182. In the next place, as there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it hence follows, that he must do it without any reward or compensation, unless, indeed, it be expressly stipulated for between the partners, as it well may be under peculiar circumstances.[5] [And on the same principle a surviv-

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 142, 2d edit.

[2] Collyer on Partn. B. 2, ch. 2, § 1, p. 126, 2d edit.; Rowe *v.* Woods, 2 Jac. & Walk. 552, 558.

[3] Ibid.

[4] Dig. Lib. 17, tit. 2, l. 52, § 13; Pothier, Pand. Lib. 17, tit. 2, n. 33.

[5] Thornton *v.* Proctor, 1 Anst. R. 94; Franklin *v.* Robinson, 1 Johns. Ch. R. 157, 165; Bradford *v.* Kimberly, 3 Johns. Ch. R. 431, 434; Caldwell *v.*

ing partner has been held not entitled to compensation for services in winding up the affairs of the firm.[1]] The reason is, that each partner, in taking care of the joint property, is in fact taking care of his own interest, and is performing his own duties and obligations, implied in, and constituting a part of, the consideration for the others to engage in the partnership; and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business, for the obvious reason, that it is impossible to see, how far in the original estimate of the parties, when the connection was formed, the relative experience, skill, ability, or even the known character and reputation of each, entered as ingredients into the adjustment of the terms thereof.[2]

[§ 182 *a*. Interest on advances of capital by one of the partners to the firm, will be allowed, where there is any agreement or understanding to that effect.[3] But it has been distinctly declared by an American court that, in the absence of any such evidence, neither of the partners will be entitled to interest on advances before

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Lieber, 7 Paige, R. 483; Burden *v.* Burden, 1 Ves. & Beam. 170; Lee *v.* Lashbrook, 8 Dana, R. 219; Whittle *v.* McFarlane, 1 Knapp, R. 312, 315; Lewis *v.* Moffat, 11 Illinois R. 392; Lyman *v.* Lyman, 2 Paine, C. C. 11; King *v.* Hamilton, 16 Ill. 190; Coursen *v.* Hamlin, 2 Duer, 513.

[1] Beatty *v.* Wray, 19 Penn. St. R. 516.

[2] Thornton *v.* Proctor, 1 Anst. R. 94; Franklin *v.* Robinson, 1 Johns. Ch. R. 157, 165; Bradford *v.* Kimberly, 3 Johns. Ch. R. 431, 434; Caldwell *v.* Lieber, 7 Paige, R. 483; Burden *v.* Burden, 1 Ves. & Beam. 170; Lee *v.* Lashbrook, 8 Dana, R. 219; Whittle *v.* McFarlane, 1 Knapp, R. 312, 315; Lewis *v.* Moffat, 11 Illinois R. 392; Lyman *v.* Lyman, 2 Paine, C. C. 11; King *v.* Hamilton, 16 Ill. 190; Coursen *v.* Hamlin, 2 Duer, 513.

[3] Collyer on Partn. (Perkins's edit.) B. 2, ch. 3, § 338, note, p. 309; Winsor *v.* Savage, 9 Metc. R. 346; Hodges *v.* Parker, 17 Vermont R. 242; Willandon *v.* Sylvestre, 8 Curry (Louis.), 262; Reynolds *v.* Mardis, 17 Ala. 32.

a general settlement or dissolution.[1] An eminent English judge has intimated a contrary opinion. According to him, the law is not clear, that, where partners are equally laborious and equally attentive to the business, interest should not be allowed on any excess of capital, and the parties thus be put on equal terms in that respect. "Can one believe," he says, commenting on the facts of a case in judgment, "that the party, to whom the whole capital belonged, renounced his advantage in that respect, and continuing to take an equally laborious part in the transaction of the business, should bring in his whole income, both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and copartner? I must say, I have a great difficulty in coming to such a conclusion as that.[2]"]

§ 183. Nor is good faith alone required in all partnership acts; but also the exercise of a sound and reasonable discretion by each partner, for the mutual benefit and interest of the concern. It is, therefore, the duty of each partner to avoid transgressing or abusing in any way the ordinary privileges of a partner in the management of the concern; as, for example, by profuse, or wanton, or unnecessary expenditures in the partnership business, or by rash and imprudent speculations, or by negligent or extravagant sacrifices of the

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[1] Lee v. Lashbrook, 8 Dana, R. 214; Jones v. Jones, 1 Iredell, Eq. R. 332; Honore v. Colmesnil, 7 Dana, R. 199; Waggoner v. Gray, 2 Hen. & Munf. 603; Dexter v. Arnold, 3 Mason, R. 284; Desha v. Smith, 20 Ala. 747.

[2] Millar v. Craig, 6 Beavan, R. 433; Hodges v. Parker, 17 Vermont R. 242; Stoughton v. Lynch, 1 Johnson, Ch. R. 467; Simpson v. Felts, 1 McCord, Ch. R. 213; The German Mining Co. in re, 19 Eng. Law & Eq. R. 591; Beacham v. Eckford, 2 Sandford, Ch. R. 116. See post, § 349, note 4.

partnership property.[1] Even where a right is reserved to one partner to assign his share to another, who shall thereby be entitled to admission as a partner, good faith would seem to require, that the assignment should be to a person of competent skill and honesty, and not to a mere insolvent, or to a known profligate; for this would seem to be an abuse, and not a fair exercise of the right of assignment.[2]

§ 184. Pothier, in discussing the subject of the rights, duties, and obligations of partners, in respect to each other, has laid down a number of general rules, as guides and principles. First. That each partner may use the property, belonging to the partnership, according to its proper use and destination, and not otherwise, reciprocally allowing to his other partners the like use and privilege.[3] Second. That each partner has a right to compel the other partners to bear their share of the expenses, which are necessary for the preservation of

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[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 127, 2d edit.

[2] Collyer on Partn. B. 2, ch. 2, § 1, p. 129, 130, 2d edit.; 2 Bell, Comm. B. 7, p. 620, 5th edit. — In the case of Jeffreys v. Smith (3 Russ. R. 158, 168), Sir John Copley (Master of the Rolls), seemed to think, that the insolvency of the assignee constituted no just objection. On that occasion he said: "It is said, that the assignment was colorable; that is, that it was made for the sake of securing the assignor from future liability. Suppose he made it with that view, he had a right so to protect himself from future liability. It is alleged, that the assignee was not a responsible person. Let it be so; Guppy, for the purpose of securing himself, had a right to assign to a person not responsible. The only ground of objection would be, that, though there was an assignment in form, there was an understanding between the parties, that the assignee should be a trustee for the assignor. Here there is no pretence for such a supposition. I must hold, therefore, that, at all events, the assignment, coupled with the notice, freed Guppy from future liability." But ought not a court of equity to interfere, where an assignment is made to a notoriously incompetent person, or to one of bad and dissolute habits? See 2 Bell, Comm. B. 7, p. 620, 5th edit.

[3] Pothier, de Societé, n. 84, 85.

the common property.[1] Third. No partner has a right to make any material change or innovation upon the common, permanent, or fixed property, or inheritable estate of the firm, even though it may be beneficial to the firm, without the consent of his partners; for this is deemed an authority not delegated by the firm, and which any one may prohibit from being done.[2] Fourth. No partner can alienate or bind the property of the firm, except to the extent of his own interest therein.[3] These rules may not be unreasonable in themselves; but it cannot be affirmed, that all of them have a just foundation in our law. On the contrary, as we have seen, some of them are repudiated.[4] Pothier afterwards adds some other obligations of partners *inter sese;* as for example, that each partner is bound to account to the others for all that he owes to the firm, deducting what is due to him by the firm.[5] So, also, each partner is bound to account to the extent of the share, which he has in the partnership, for whatever is due to his other partners by the firm, deducting whatever those partners owe to the firm.[6] These rules seem little more than an expansion of the principles of the Roman law on the same subject.[7]

§ 185. This is but a very summary view of the leading rights, duties, and obligations of partners *inter sese,* implied by law; and indeed a full enumeration of them,

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[1] Pothier, de Societé, n. 86.

[2] Pothier, de Societé, n. 87, 88.

[3] Pothier, de Societé, n. 89.

[4] Ante, § 95.

[5] Pothier, de Societé, n. 108 to 123.

[6] Pothier, de Societé, n. 108, n. 126 to n. 132.

[7] Pothier, Pand. Lib. 17, tit. 2, n. 26 to n. 29; Id. n. 33; Id. n. 36. See also 1 Domat, B. 8, tit. 8, § 4, art. 7, art. 10 to art. 16.

with reference to the circumstances of each particular kind of partnership, would be found at once tediously minute, and of little value, even if it were practicable. The rights, duties, and obligations of partners *inter sese* must necessarily be expanded or restrained, to meet the exigencies of their peculiar trade and business; and general rules can do little more than to point out the ordinary course in common transactions. We shall have occasion hereafter to consider the rights, duties, and obligations, expressed in, and arising under articles of partnership, and the interpretation thereof. But, in concluding this part of the subject, it may be remarked, that partners are entitled *inter sese* to be allowed all charges, losses, and expenditures, which they have properly, or necessarily, or unavoidably, incurred in transacting the partnership business.[1] On the other hand (as we have seen),[2] no partner is entitled, unless under some special agreement, to any compensation, commission, or reward, for his skill, labor, or services, while employed in the partnership business.[3] The nature of the contract implying, that each partner shall gratuitously give and exert all his skill, labor, and services, so far as they may be properly required for the due accomplishment and success of the partnership operation.[4] If any

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[1] See 1 Domat, B. 1, tit. 8, § 4, art. 11, 12; Thornton *v.* Proctor, 1 Anst. 94.

[2] Ante, § 183.

[3] Collyer on Partn. B. 2, ch. 2, § 1, p. 130; Id. § 2, p. 142, 151, 2d edit.; Franklin *v.* Robinson, 1 Johns. Ch. R. 157, 165; Whittle *v.* McFarlane, 1 Knapp, Pr. C. R. 312; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68; Burden *v.* Burden, 1 Ves. & Beam. 170; Ante, § 183.

[4] Ante, § 183; Franklin *v.* Robinson, 1 Johns. Ch. R. 157, 165; Whittle *v.* McFarlane, 1 Knapp, R. 312; Bradford *v.* Kimberley, 3 Johns. Ch. R. 433; Dougherty *v.* Van Nostrand, 1 Hoffm. R. 68; Burden *v.* Burden, 1 Ves. & Beam. R. 170.

allowance is intended to be made for extra services or labor, it is a fit matter to be adjusted in the articles, under which the partnership is formed.

§ 186. John Voet lays down the like doctrine in expressive terms, admitting at the same time, that, by custom or special agreement, a compensation may be allowed to one or more partners for extraordinary labor, skill, or services. "*Salarium seu honorarium quod attinet, licet rarior ejus in societate, quam quidem in mandato, usus sit, dum partes lucri singulis obvenientes sufficiens operæ pretium sunt. Nihil tamen impedit, quo minus uni socio, negotia societatis forte potissimum aut unice tractanti ac promoventi, cum ad illam operam supra cæteros præstandam ex conventione non teneretur, vel ab initio salarium aliquod assignetur, vel postea viri boni arbitratu adjudicetur, idque extraordinariâ potius magistratus cognitione, quam ordinariâ pro socio actione intentatâ, argumento eorum quæ de salario in mandato interveniente dicta sunt. Quod et moribus hodiernis conveniens esse, patet ex responso Jurisconsultorum et mercatorum inter Responsa Jurisconsultorum Hollandiæ.*"[1] The same doctrine may be traced back to the Roman law.[2]

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1 Voet, ad Pand. Lib. 17, tit. 2, § 19, Tom. 1, p. 757.

2 1 Domat, B. 1, tit. 8, § 4, art. 11, 12.

CHAPTER X.

RIGHTS, DUTIES, AND OBLIGATIONS OF PARTNERS UNDER THE ARTICLES THEREOF.

§ 187. HITHERTO, we have been mainly considering the rights, duties, and obligations of partners *inter sese*, implied by law. But, as written articles often exist relative to the formation, management, rights, duties, and obligations of the particular partnership, it may not be without use to bring together some of the more important stipulations and arrangements usually contained in those articles, and to ascertain what, in point of law, is the true interpretation, application, and objects thereof; and, incidentally, how far they are capable of being enforced, either in Courts of Law or in Courts of Equity.[1]

§ 188. At the threshold of these inquiries we are met with the question, whether Courts of Equity (for it is clear, that Courts of Common Law have no jurisdiction, except to give damages), are competent to decree the specific performance of a preliminary agreement to enter into a partnership; and if so, under what circumstances a specific performance will be decreed. In respect to this matter, it may be at once perceived how

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[1] I have availed myself throughout this whole chapter mainly of the materials contained in Mr. Collyer's able work on Partnership, B. 2, ch. 2, § 2, p. 131 to 162, 2d edit. Mr. Bell has also devoted a considerable space to the examination of the same subject, which will well reward the attentive examination of the learned reader. 2 Bell, Comm. B. 7, ch. 2, § 4, p. 645 to 648, 5th edit.

full of delicacy, difficulty, and embarrassment, every attempt to enforce a preliminary contract of this sort must be. The success of every partnership is usually so essentially dependent upon the hearty coöperation and exertions of all the partners for the common good; and reluctance, and discontent, and resistance are so incompatible with such success; that at first it would seem, that no Court of Equity ought to exert any such authority to compel an observance of a mere treaty to form a partnership. But, on the other hand, there may be serious evils, resulting from a total refusal to interfere in all cases of this sort under any circumstances; for one or more of the partners may have incurred responsibilities on account of the intended firm, or preliminary steps for the business of the intended partnership may have been taken, and acts done, putting the same into an inchoate and imperfect operation upon the full faith and confidence of the punctilious discharge of duties by the other side, so that it may work a most serious, if not an irreparable mischief and injury, not to enforce the specific performance of the contract, so as to bind all parties to the acts so done, and to the responsibilities so incurred.

§ 189. Courts of Equity have upon this subject adopted an intermediate ground; while, on the one hand, they will not ordinarily entertain bills for a specific performance of such a preliminary contract; they will, on the other hand, under special and peculiar circumstances, in order to suppress frauds, or manifestly mischievous consequences, compel such a performance.[1]

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[1] Buxton *v.* Lister, 3 Atk. 383, 385; Hibbert *v.* Hibbert, cited Collyer on Partn. B. 2, ch. 2, § 2, p. 132, 133, 2d edit.; Watson on Partn. ch. 1, p. 60, 2d edit.; Anon. 2 Ves. R. 629, 630; Gow on Partn. ch. 2, § 4,

One of the cases, in which Courts of Equity will not ordinarily interfere, is, where the partnership is to continue during the mere pleasure of the parties; for in such a case it seems utterly nugatory to decree a partnership, which may be immediately dissolved at the will of the dissatisfied party.[1] On the other hand, where the partnership has informally gone into operation, or it is for a specific term of time, Courts of

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p. 109, 110, 3d edit.; 1 Story on Eq. Jurisp. § 666, and note; Collyer on Partn. B. 2, ch. 2, § 2, p. 131, 132, 133, 2d edit. — Lord Hardwicke, in Buxton *v.* Lister (3 Atk. R. 385), *arguendo*, said: "Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off; I should be of opinion, upon a bill brought by the other in this court, for a specific performance, that, notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed."

[1] Hercy *v.* Birch, 9 Ves. 357, 359; 1 Madd. Ch. Pract. 411, note (x); Collyer on Partn. B. 2, ch. 2, § 2, p. 133, 134, 135, 2d edit.; Van Sandau *v.* Moore, 1 Russ. R. 441, 463. But see Gow on Partn. ch. 2, § 4, p. 110, 111, 3d edit. — Mr. Swanston, in his learned note to Crawshay *v.* Maule (1 Swanst. R. 513), has remarked: "It seems clear, that, in general, the Court of Chancery will compel specific performance of an agreement for a partnership (Buxton *v.* Lister, 3 Atk. 385; Anon. 2 Ves. 629); but Lord Eldon is represented to have held, that this doctrine is not applicable to partnerships, which may be immediately dissolved. Hercy *v.* Birch, 9 Ves. 360. See Maddock's Princip. & Pract. vol. 1, p. 411, 2d edit. This distinction, however, must be received, it is presumed, not without qualification. In many such cases, though the partnership could be immediately dissolved, the performance of the agreement (like the execution of a lease after the expiration of the term, see Nesbitt *v.* Meyer, 1 Swanst. R. p. 226), might be important, as investing the party with the legal rights, for which he contracted." We have already seen (ante, § 182), that, although in ordinary partnerships the Roman law only gave the action *pro socio* after a dissolution of the partnership; yet in certain peculiar partnerships for collection of the public revenue (*Causâ Vectigalium*), the action *pro socio* for an account lay during the continuance of the partnership. Pothier, Pand. Lib. 17, tit. 2, n. 33; Dig. Lib. 17, tit. 2, l. 65, § 15.

Equity have not unfrequently decreed a specific performance, with the view of investing the parties fully with all their legal rights.[1]

§ 190. Passing from these preliminary considerations, let us, in the next place, attend to some of the more important stipulations usually contained in articles of partnership. And here it is to be observed, that the same rules of construction apply, as in ordinary cases; that is to say, to ascertain, what is the real intention of the parties in particular stipulations; and, when ascertained, to carry it into effect, limiting any general language, incautiously used, to the particular purposes and objects and transactions specified.[2] On the other hand, general language, and especially such as relates to the nature and extent of covenants, may frequently be applied, and deemed to run through the whole body of the articles. Thus, for example, the words of covenant, which usually occur at the commencement, or introductory part of the articles, usually declare the covenant to be joint and several; and words of covenant in the succeeding stipulations of the instrument are on that account usually construed, although not so expressed, to be also intended to be joint and several.[3]

§ 191. It is not, however, less important, in order to arrive at correct results, to take into consideration other matters. Thus, although the articles of part-

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 135, 2d edit.; Gow on Partn. ch. 2, § 4, p. 109, 110, 3d edit. But see Downs *v.* Collins, 6 Hare, R. 418.

[2] Collyer on Partn. B. 2, ch. 2, p. 137; 1 Fonbl. Eq. B. 1, ch. 6, § 16, and note (1); Gainsborough *v.* Stark, Barnard, Ch. R. 312.

[3] Collyer on Partn. B. 2, ch. 2, § 2, p. 139, 2d edit.; Id. B. 2, ch. 3, § 1, p. 169.

nership, so far as they regulate the rights, duties, obligations, and interests of the parties thereto, in certain specified cases; yet they leave in full force all the other rights, duties, obligations, and interests, implied by law, so far as they are not superseded, controlled, qualified, or limited by those articles.[1] In the next place, in all cases of doubtful interpretation, the actual construction, adopted by the partners in their partnership transactions, will be, and indeed ought to be, adopted, as the true, legitimate, and appropriate interpretation intended by themselves.[2] [Entries in the books of a partnership have been said to be as conclusive of the rights of the partners, as if prescribed in a regular contract.[3]]

§ 192. In the next place, partnership articles in the view of Courts of Equity, whatever may be the rule at law, are liable to be controlled, superseded, qualified, or waived by the acts and transactions of the partnership, in the course of the business thereof, wherever the assent of all the partners thereto may be fairly inferred, and however positive, or stringent, those provisions may be. [" Partners," it has been said, " if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 138, 139; Crawshay v. Collins, 15 Ves. 226; Jackson v. Sedgwick, 1 Swanst. R. 469; Pettit v. Janeson, 6 Madd. R. 146.

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 139, 2d edit.; Geddes v. Wallace, 2 Bligh, R. 270, 271, 297, 298; Beachan v. Eckford, 2 Sandford, Ch. R. 116.

[3] Stewart v. Forbes, 1 Hall & Twells, R. 461; s. c., 1 Macnaghten & Gordon, R. 137.

or alterations be made with the unanimous concurrence of all the partners." [1]] In short, in many cases of this kind, looking to the course of conduct of the partners, and the special circumstances of their business, or to their general acquiescence, or their positive acts, we may often have the most satisfactory evidence that the partnership articles have been laid aside, either *pro tanto*, or in whole, and that new articles and arrangements have been entered into in their stead.[2] Hence,

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[1] England *v.* Curling, 8 Beav. R. 129; McDougald *v.* Banks, 13 Georgia R. 451.

[2] Geddes *v.* Wallace, 2 Bligh, R. 271, 297, 298; Jackson *v.* Sedgwick, 1 Swanst. R. 460, 469; England *v.* Curling, 8 Beav. R. 129; Stewart *v.* Forbes, 1 Hall & Twells, R. 461; S. C. 1 Macnaghten & Gordon, R. 137; Const *v.* Harris, Turn. & Russ. R. 496, 523; Gow on Partn. ch. 1, § 1, p. 9, 10, 3d edit.—In Const *v.* Harris (Turn. & Russ. R. 523), Lord Eldon said: "In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms, upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing, not long, but still so long, as to demonstrate, that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership, the parties agree, that no one of them shall draw or accept a bill of exchange in his own name, without the concurrence of all the others; yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills, without the concurrence of the others, this court will hold, that they have varied the terms of the original agreement in that respect. So, in this case, if it can be shown, that in the administration of this property, the proprietors in general, after 1812, pursued a different course from that provided for by the deed of March, 1812, they must be taken to have altered the agreement, and to have substituted the terms, to which, in their conduct, they have adhered, instead of the terms contained in the original agreement. And, with respect to the present plaintiff, there can be no doubt, that if, after the deed of 1812 was executed, his testatrix gave in to a course of administration of the property, different from the course provided for by the deed; if her acts, or the acts of others with her consent, afforded such evidence of departure from the terms of the written agreement, as to amount to the substitution of a new agreement, though evidenced only by parol, instead of the written agreement; he, claiming under her, must be bound by her acts, and cannot be at liberty

it has been judicially declared, that, in Courts of Equity, articles of partnership, containing clauses, which have not been acted upon by the parties, are read, as if those clauses were expunged, or were not inserted therein.[1]

§ 193. In respect to the nature, and extent, and kind of business of the partnership, as stated in the articles, Courts of Equity construe the articles strictly, and do not permit the business to be extended by any of the partners, without the consent of all of them, either express or implied, to any other business or branch of business, of a different nature, extent, or kind; and if it is attempted, they will interpose by way of injunction to restrain the offending parties.[2]

§ 194. In the next place, as to the commencement of the partnership. If no other time is fixed by the articles, the commencement will take place from the date and execution of the instrument.[3] And this rule is so inflexible at law, that parol evidence has been deemed inadmissible to control this intendment, although the partnership would thus be rendered illegal, at least, if thereby the true construction of the words of the instrument would be varied.[4] This is certainly

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to revert back from those acts, establishing a new agreement, to call into operation again the old agreement, and to insist, that the non-execution of the old agreement is, in such circumstances, a breach of trust. So, again, it is a principle of this court with respect to partnership concerns, that a partner, who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself to do his duty toward them."

[1] Jackson v. Sedgwick, 1 Swanst. R. 460, 469; Collyer on Partn. B. 2, ch. 2, § 2, p. 139, 2d edit.

[2] Natusch v. Irving, Gow on Partn. Appx. 398, 407, 3d edit.; Id. p. 111, 112.

[3] Collyer on Partn. B. 2, ch. 2, § 2, p. 140, 2d edit.

[4] Williams v. Jones, 5 Barn. & Cresw. 108. — Perhaps this case re-

pressing the law of implied construction to a great, but perhaps not to an undue extent. It would not probably be acted upon by Courts of Equity, unless the parol evidence was repugnant to the terms of the written contract, as, for example, by making the agreement conditional, when upon its face it was absolute; and not merely a supplement thereto.

§ 195. In the next place, as to the duration of the partnership. Although the partnership be fixed to a particular term or period of time, yet it is always understood, as an implied condition or reservation (unless the contrary is expressly stipulated), that it is dissolved by the death of either of the partners, at any time within that period.[1] This doctrine seems an exception to the ordinary rules of the common law in the interpretation of contracts; and it has sometimes been complained of as unreasonable. But it seems founded in very equitable principles, and is a natural result of the peculiar objects of the contract.[2] Every

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quires a more full exposition. The ground, upon which the learned Judges put it, was, that the evidence made the instrument conditional, instead of being, as it was in terms, absolute. But, suppose the instrument had been signed on the first day of January, and it was agreed between the parties by parol, that it should commence on the first day of the ensuing February, would the like objection have applied?

[1] Collyer on Partn. B. 1, ch. 2, § 2, p. 73, 74, 2d edit.; Id. B. 2, ch. 2, § 2, p. 140; Crawford *v.* Hamilton, 3 Madd. R. 254; Scholefield *v.* Eichelberger, 7 Peters, R. 594; Vulliamy *v.* Noble, 3 Meriv. R. 614; Gow on Partn. ch. 5, § 1, p. 219, 220, 3d edit.; Gratz *v.* Bayard, 11 Serg. & R. 41.

[2] In Crawshay *v.* Maule (1 Swanst. R. 509), Lord Eldon said: "The doctrine, that death or notice ends a partnership, has been called unreasonable. It is not necessary to examine that opinion; but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; but if they enter into it without saying how long it shall endure, they

partnership is founded upon a *delectus personæ*, which implies confidence and knowledge of the personal character and skill and ability of the other associates; and their personal coöperation, advice, and aid, in all the transactions thereof. The death of any one partner necessarily puts an end to all such coöperation, advice, and skill. If, therefore, the partnership were not, whatever might be the stipulated terms for its continuance, put an end to by the death of any one partner, one of two things must follow; either that the whole business of the partnership must be carried on by the surviving partners exclusively, at the hazard of the estate and interests of the deceased partner; or else that the personal representative of the deceased, *toties quoties*, who may be a mere stranger, or even a woman, wholly unfit for and unacquainted with the business, must be admitted into the management. We see at once, that either alternative may be highly inconvenient or injurious to the rights, interests, and objects of the original concern.[1] The law, therefore, will not force it upon the parties; but it presumes, in the absence of all contrary stipulations, that by a tacit consent, death is to dissolve the partnership, because it

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are understood to take that course in the expectation, that circumstances may arise, in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying, that such should be its effect. Is the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation, or assignment from his representative?"

[1] See Pearce *v.* Chamberlain, 2 Ves. 33, 34; Pothier, de Societé, n. 144, 145; Domat, B. 1, tit. 8, § 4, art. 14; Id. B. 1, tit. 8, § 2, art. 3, 4.

dissolves the power of a personal choice, confidence, and management of the concern.[1]

§ 196. The Roman law adopted this doctrine in its fullest extent, and did not (as we have seen), even permit the parties by their private stipulations to agree, that upon the death of a partner, his heir should be admitted into the partnership, for the reasons before suggested. *Solvitur adhuc societas etiam morte socii; quia qui societatem contrahit, certam personam sibi eligit. Sed et, si consensus plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint; nisi in coeundâ societate aliter convenerit.*[2] This last qualification, as we shall presently see, applied only to the continuance of the partnership by the survivors.[3] *Nemo potest societatem hæredi suo sic parere, ut ipse hæres socius sit.*[4] *Idem respondit, societatem non posse ultra mortem porrigi; et ideo nec libertatem de supremis judiciis constringere quis poterit, vel cognatum ulteriorem pro muneribus inferre.*[5] Again: *Adeo, morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres etiam succedat societati.*[6] *Societas quem admodum ad hæredes socii non transit, ita nec ad adrogatorem; Ne alioquin invitus quis socius efficiatur, cui non vult.*[7] The law of England, as well as that of France (as we have seen), is contrary in this respect to the Roman law; and permits the parties, by express stipulation, to provide for the continuance of the partnership after the death of one partner, and for

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1 Gow on Part. ch. 5, § 1, p. 218, 219, 220, 3d edit.; Mr. Swanston's note to Crawshay *v.* Maule, 1 Swanst. R. 509, note (a).

2 Inst. Lib. 3, tit. 26, § 5.

3 Domat, B. 1, tit. 8, § 5, art. 14, 15.

4 Dig. Lib. 17, tit. 2, l. 35.

5 Dig. Lib. 17, tit. 2, l. 52, § 9.

6 Dig. Lib. 17, tit. 2, l. 59.

7 Dig. Lib. 17, tit. 2, l. 65, § 11; Dig. Lib. 3, tit. 2, l. 6, § 6.

the admission thereto of his heir, or other representative.[1]

§ 197. But, suppose the original term of the partnership should expire by the mere effluxion of time, and still the partnership should (as indeed not unfrequently happens) continue to be carried on by the same parties, without the execution of any new articles of partnership, or without any express recognition of the old articles; the question would arise, as to what ought, under such circumstances, to be deemed the terms and stipulations of the continued partnership. Is it to be presumed to be renewed for the like period of time, and upon the like stipulations and conditions, as those which were contained in the old articles? Or is it to be deemed a mere partnership during the pleasure of both parties, and dissoluble instantaneously at the will of either? And, if the latter be the true predicament thereof, then, are the interests of the parties, and their shares in the profits, while it is actually continued, to be governed and guided by the stipulations of the old articles, or not?

§ 198. Perhaps these inquiries cannot be answered universally in the same manner, as equally applicable to the circumstances of all cases; for the habits of the trade, and the conduct of the parties, may often establish the fact satisfactorily, that some of the articles have been practically waived, or abrogated, or qualified, while others are necessarily implied, as being in full

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[1] Ante, § 5; Pearce *v.* Chamberlain, 2 Ves. R. 33; Balmain *v.* Shore, 9 Ves. 500; Crawshay *v.* Maule, 1 Swanst. R. 495, 508; Pothier, de Societé, n. 144, 145; Gow on Partn. ch. 5, § 1, p. 219, 220, 3d edit.; Collyer on Partn. B. 2, ch. 2, § 2, p. 140, 147, 2d edit.; Gratz *v.* Bayard, 11 Serg. & Rawle, 41.

force and operation. In such cases, the presumption of the actual state of the partnership contract will necessarily vary with the circumstances, and be governed by them, and not govern them. In the absence, however, of all presumptions of this nature, the general rule seems to be, that the partnership is to be deemed one for no definite period, but dissoluble at the will of any of the partners;[1] but that, in other respects, the old articles of the expired partnership are to be deemed adopted by implication, as the basis of the new partnership during its actual continuance.[2] [Thus, if by the written agreement one partner is to receive no compensation for his time and services unless a profit is realized from the business, and by the articles of partnership it was to continue for one year, but was in fact continued two years without any new agreement, it was held that the same provision must apply to the second year.[3]]

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[1] Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 307. See Gould *v.* Horner, 12 Barbour, 601.

[2] Booth *v.* Parks, 1 Molloy, R. 466; Crawshay *v.* Collins, 15 Ves. 218, 228; United States Bank *v.* Binney, 5 Mason, R. 176, 185. — In this last case the Court said: "Whether the present be a limited or general partnership, is to be determined by the whole evidence in the case. It is certain, that by the articles it is a limited copartnership, and confined to the soap and candle business. Those articles expired, by their own limitation, in two years, and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that as the partnership was continued in fact, it was continued on the same terms as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the copartnership; and therefore it is open for inquiry upon all the evidence. The present notes were made and indorsed long after the term of two years expired. The plaintiffs contend, that the partnership was then general; the defendants, that it was limited, as before. The jury must determine between them, upon weighing all the facts and presumptions."

[3] Bradley *v.* Chamberlin, 16 Verm. 613.

§ 199. In this connection, it may be well to say a few words, as to clauses in articles of partnership, stipulating for the continuance thereof, notwithstanding the death of one or more of the partners. Such a clause is usually introduced into partnerships for a long term of years, where the outlay of capital is great in permanent fixtures and manufacturing establishments, and the locality of the trade renders it important in point of profit and good-will, that it should be steadily carried on, as long as may be, under the same proprietors or their representatives. In cases of this sort, the clause commonly empowers the representative of the deceased partner to carry on the trade, in conjunction with the survivors, for the benefit of the widow and children of the deceased partner; and frequently, also, for the admission of one or more of his children into the concern, upon his or their arrival at majority.[1] Sometimes the provision partakes of the character of a settlement, giving an interest in the partnership to the widow, during her life, and dividing her share, after her death, equally among all the children.[2] Under such circumstances, the question may arise, whether all the children take a vested interest in the partnership trade, from time to time, as they are born, so that, although they should die during the lifetime of their mother, yet their shares thereof will be transmissible; or, whether such children only, as are living at the death of the mother, are entitled to take a vested share or interest. It has been decided, that the latter is the true interpretation to be put upon such provisions;

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 147, 148, 2d edit. See Downs *v.* Collins, 6 Hare, R. 418.

[2] Ibid.

upon the ground, that the primary object of all such clauses, is the continuance of the partnership; and that all the other provisions, contained therein, ought to be treated as subservient to this leading purpose.[1]

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 147, 148, 2d edit.; Balmain *v.* Shore, 9 Ves. 500, 506, 507.—The case of Balmain *v.* Shore was of this nature; and Sir Wm. Grant, in delivering his judgment said: "The object of these very ill-drawn articles is to constitute a partnership for the very unusual term of 99 years. As it was not to be expected any of the parties should live so long, it was necessary to ascertain in what mode the partnership was to continue after their death; and it appears to have been intended for their own benefit, and that of their families, called, in some parts of the articles, their sequels in right. From the manner in which the interests are given in the clause, more particularly ascertaining the mode of succession to the shares, the question arises, whether the words are to be construed, as they would be, if applied to dispositions of property in general; or a different construction is to be made, from the consideration of the subject. It must be admitted, that if this were a settlement of a sum of money, or other property, the children would take vested interests; and the words, 'after the decease of such widow,' &c., would postpone, not the commencement of the interest, but only the commencement of the possession. Accordingly, it was contended, on the one hand, that under this instrument all the children took vested interests in the partnership shares, as they were born; and though some died before their mothers, yet their shares were transmissible; on the other, that the words in the clause, to which I have alluded, are to have a different construction; and that such children only will be entitled to a share, as shall be living at the death of the widow. The words, I think, must receive their construction from the consideration of the particular instrument. The primary object was to constitute a partnership, and to ascertain the manner in which the shares were to be enjoyed in succession. It was but a secondary object, and through that medium, to give a benefit to the families; and it appears to me, the object of this clause was to designate and ascertain, who are to supply the vacancies, as they shall happen; that no interest was intended by anticipation to any one; but the object was to provide for the filling up of that vacancy, which might happen by the death of any partner interested in the partnership. For instance, where one of the original partners died, and left a widow, she instantly was to succeed to a share; when she died, and left children, they were instantly to succeed to that share; and, until a vacancy happened, there was no room for ascertaining the objects, who were to come in the place of the party dying; and therefore such children only, as should be living at the time the vacancy happened,

§ 200. Sometimes the clause provides for the continuance of the partnership, by stipulating, that the interest of the deceased partner in the concern, after his death, and during the term of the partnership, shall go to such persons as he shall by his will name and appoint; and in default of such appointment, that it shall devolve on his wife, and in case of her death, upon his children, in equal shares; and in case of the death of all his children, to his executors and administrators, who are to succeed to all his rights and powers in the business and management of the partnership. Now, under such circumstances, the question may arise, in what manner this power of appointment is to be construed; whether as a technical power of appointment, or not. If as a technical power, then it will be necessary for the testator, in making the appointment by will, to allude in some distinct manner to the power, so as to demonstrate, that it is thereby intended to be executed; for a general gift of all his estate and effects to one or more of his children, will not be deemed a specific execution of the power. But, if not to be construed technically, then such a gift will amount to a sufficient designation of the donee or donees, as appointees of his share and interest in the concern, as succeeding partners. Upon the same enlarged view of the objects of this clause (as to the continuance of the

could be intended to succeed upon that vacancy. That is more evident from the provision as to the sale of a share; which is perfectly incompatible with the supposition, that the children, as they were born, should take vested interests in the partnership shares of their parents. It was impossible the children, then born, could take such a vested interest, as they must at all events succeed to. It was only upon the supposition, that the partner left a share, that there could be any successor; and the vacancy must happen, before the succession could be ascertained."

partnership business), it has been held, that such a power of appointment is not to be treated as technical; and, therefore, that the appointment is well executed by such a general gift.[1]

§ 201. Another question may arise under clauses for the continuance of the partnership, and the admission of the executor and administrator of the deceased partner into the firm, and that is, whether, when the partnership is intended to be continued after the death of the partner, it is a matter of election with the widow, children, appointee, or executor, or administrator, of the deceased, to continue the same, or not; or whether it is absolute and peremptory upon them. In respect to clauses of this nature, the general rule is, in the absence of all clear and well-defined declarations to the contrary, that they are to be construed, as giving the executor or administrator an option, so that he may continue the partnership, or not, as he may think proper; and of course a reasonable time will be allowed to him for that purpose.[2] Probably the same rule

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 148, 149, 2d edit.; Ponton v. Dunn, 1 Russ. & Mylne, 402. — On this occasion Sir John Leach (Master of the Rolls) said: "It is true, the words 'name and appoint' are used in the deed; but considering the relation of the parties, I cannot understand them to be used with a view to create a power of appointment in its technical sense, and to limit the testator's power of disposition by will over this part of his property. Without this stipulation, those who claimed through him, would have had no title to share in the partnership profits after his death; and it is a mere bargain with his partner, that he should have a power of disposition by will, and if he died without a will, that the property should devolve to his family in the manner stated. This property will therefore pass under the description in his will, of 'all other his estate and effects, of whatsoever nature or description.'"

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 149, 150, 2d edit.; Pigot v. Bagley, 1 McClel. & Younge, R. 569; Downs v. Collins, 6 Hare, R. 418. Where the articles provide, that the executors or administrators shall continue the

would prevail in the case of a widow, a child, a legatee, or appointee, unless the language of the provision clearly established a positive direction, that at all events the partnership should be continued.[1] If it did, then it would seem clear, that every such party must take, if he takes at all, according to the terms of the will, and not otherwise; and that he cannot elect to take the benefit without continuing the partnership.[2] [Where the option was secured to "the executor or administrator," on giving notice within three months after the decease of the parties; and the parties dying intestate, the widow gave such notice within the three months, but without taking out letters of administration till some time after the three months, it was held, that she had not effectually complied with the condition, so as to be admitted into the firm.[3]]

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partnership, if they think fit, they will be considered as partners unless they give notice within a reasonable time to the contrary. Collyer on Partn. B. 2, ch. 2, § 2, p. 151, 2d edit.; Morris *v.* Harrison, Colles, Parl. R. 157.

[1] Kershaw *v.* Matthews, 2 Russ. R. 62; Pigot *v.* Bayley, 1 McClel. & Younge, R. 509.—In the former case Lord Eldon said: "If there is a partnership carried on under articles, which stipulate that, upon the death of a partner, he shall be succeeded in the business, either by some person, whom he shall appoint, or by his executors, it may happen, that his appointees or his executors do not think proper to come into his place on the same terms on which he was a partner in the concern. In that case, the death of the party puts an end to the partnership. The stipulation may be, that the appointee or executor of the deceased partner is to be a partner only, if he does this or that particular thing. If the executor or appointee refuses to comply with the proviso, the whole concern must be wound up. But the dissolution which takes place, is not a dissolution wrought by the exclusion of the executor or appointee; for he never becomes a partner."

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 149, 150, 2d edit.; Crawshay *v.* Maule, 1 Swanst. R. 512.

[3] Holland *v.* King, 6 Manning, Granger & Scott, R. 727.

§ 201 *a.* Another question of a very important nature may arise out of a provision for the continuation of a partnership after the death of one of the partners, as to the extent to which contracts made after the death of that partner bind his assets.[1] A testator, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner, or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted.[2] And this leads

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[1] Burwell *v.* Mandeville's Ex'ors, 2 How. Sup. Ct. R. 576. See also Ex parte Garland, 10 Ves. 110, 119; Ex parte Richardson *in re* Hodgson, 3 Madd. R. 138; 1 Mylne & Keen, 116; 7 Connect. R. 307; 7 Peters, R. 594; 11 Serg. & Rawle, 41. *In re* The Northern Coal Mining Co., 10 Eng. Law & Eq. R. 171.

[2] This is clearly established by the case Ex parte Garland, 10 Ves. 110, where the subject was fully discussed by Lord Eldon, and Ex parte Richardson, 3 Madd. 138, 157, where the like doctrine was affirmed by Sir John Leach (then Vice-Chancellor), and by the same learned Judge, when Master of the Rolls, in Thompson *v.* Andrews, 1 Mylne & Keen, 116. The case of Hankey *v.* Hammock, before Lord Kenyon, when Master of the Rolls, reported in Cook's Bankrupt Law, 67, 5th edit., and more fully in a note to 3 Madd. Rep. 148; so far as may be thought to decide that the testator's assets are generally liable under all circumstances, where the trade is directed to be carried on after his death, has been completely overturned by other later cases, and expressly overruled by Lord Eldon, in 10 Ves. 110, 121, 122, where he stated that it stood alone, and he felt compelled to decide against its authority. The case of Pitkin *v.* Pitkin, 7 Conn. Rep. 307, is fully in point to the same effect. See also Burwell *v.* Mandeville's Ex'ors, 2 How. Sup. Ct. Rep. 576, where the doctrine stated in the text was affirmed.

us to remark, that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion, from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may be recalled, if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would, or might postpone the settlement of the estate for a half-century, or until long after the trade or continued partnership should terminate. Lord Eldon[1] put the inconvenience in a strong light, by suggesting several cases where the doctrine would create the most manifest embarrassments, if not utter injustice; and he said, that the convenience of mankind required him to hold, that the creditors of the trade, as such, have not a claim against the disturbed assets in the hands of third persons, under the directions in the same will, which has authorized the trade to be carried on for the benefit of other persons.[2]

§ 202. In partnership articles it is also often agreed what shall be the proper style of the firm, as for

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[1] 10 Ves. 110, 121, 122.

[2] This, also, was manifestly the opinion of Sir John Leach in the cases, 3 Madd. Rep. 128; 1 Mylne & Keen, 116, and was expressly held in the case in 7 Conn. Rep. 307.

example, John Doe and Company; and, under such circumstances, it is a part of the duty of every partner, in signing contracts and other instruments, punctiliously to observe and follow the very formulary.[1] This may be necessary, not only to bind the firm itself, but also to absolve him from any personal liability, not only to third persons, but also to his partner.[2] It will be a clear breach of such duty and engagement, to use another firm name as that of the firm; as, for example, if the firm name be Doe & Roe, to use the name of Doe & Company, or Doe & Roe & Company.[3] It will be equally a breach for one partner to sign his own name, adding "for self and partners;" because by those words it can no more be known, who are his partners, whom he means to bind, than by any other general words.[4] This doctrine applies, *à fortiori*, where the firm name is intended to express the names of all, who are partners, as for example, John & Richard Doe; for in such a case it may be for the benefit of each partner, that he may be known to the world to be a member in that concern, and also, that, as between the partners themselves and the world, it should not be left as a mere matter of speculation, who are really partners, or who are not dormant partners; but that the firm may have the credit, and the public the confi-

[1] Collyer on Partn. B. 2, ch 2, § 2, p. 241, 2d edit.

[2] See Ante, § 102; Shipton *v.* Thornton, 9 Adol. & Ellis, 314, 329 *to* 332; Faith *v.* Raymond, 11 Adol. & Ellis, 339; Ante, § 102, 136, 142.

[3] Collyer on Partn. B. 2, ch. 2, § 2, p. 141, 2d edit.; Marshall *v.* Colman, 2 Jac. & Walk. 266, 268, 269. [But where a partnership was to be carried on "in the name of Seymour & Ayres," a signature of these names, with the addition of their respective Christian names, was held to bind the partnership. Newton *v.* Boodle, 3 Manning, Granger & Scott, R. 792. But see *In re* Warren, Daveis, R. 326.]

[4] Ibid.

dence, resulting from the knowledge of the fact.[1] And probably a Court of Equity might, in a case of this sort, interfere by way of injunction, to prevent any mischief to the firm, by thus exposing it to the consequence of being made liable for proceedings of one partner, to which it did not really assent.[2]

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[1] Marshall v. Colman, 2 Jac. & Walk. 266, 269.

[2] Ibid. — In Marshall v. Colman (2 Jack. & Walk. 266), a bill was filed for such an injunction, not asking for a dissolution. But it was denied upon special grounds. On that occasion Lord Eldon said: "There is only this point in the case now before me, which I wish seriously to consider, namely, that although this Court will interfere, where there is a breach of covenants in articles of partnership, so important in its consequences, as to authorize the party complaining to call for a dissolution of the partnership, whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of producing a decree (for this is what is to be done in the cause, in which this motion is now made) for a perpetual injunction, as to a particular covenant, the partnership not being dissolved by the Court. There is one case, which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the Court interferes then, because there is a ground for dissolving the partnership. But then the danger must be such, there must be that abuse of good faith between the members of the partnership, that the Court will try the question, whether the partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity for the Court to interfere, where one party violates a particular covenant, and the other party does not choose to put an end to the partnership; in that way there may be a separate suit and a perpetual injunction in respect of each covenant; that is, a jurisdiction, that we have never decidedly entertained. All this bill seeks is a perpetual injunction against using any other than this particular firm and name; and the question would be, if very serious mischief were to arise from not using it, whether the party would not be obliged to frame his bill differently. I have no difficulty in saying, that where the members of a partnership contract by covenant, that the firm shall be A., B., C., and D., that it is a breach of that covenant for A. to sign those instruments, to which the covenant refers, in the name A. and Co.; but it is no less a breach of that covenant for D. to sign his own name, adding 'for self and partners,' because by these words it can no more be known, who are his partners, than by the word Co. When partners enter into such contracts, the

§ 203. In the next place, partnership articles often contain provisions for the advance of particular amounts towards the capital stock, at particular periods, or provisions for the admission of other partners, upon the payment of particular sums of money, by them, by instalments. In all such cases the party so contracting is treated as a debtor to the firm, to the full amount so to be contributed or paid, as *debitum in præsenti, solvendum in futuro*; and, indeed, he stands in equity as to such

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meaning and intent is, that, in the first place, it may be known to the world, for the benefit of each partner, that he is a partner in that concern, and also that, as between each partner and the world, it should not be left to them to speculate, who are really partners, or who are dormant partners, and so on. It is intended, that each individual may have the credit, which belongs to his name, and may not be exposed to consequences, which might arise from his name not being used. But it must be made out to be a case, which goes further than this does, to entitle the Court to grant an injunction against the breach of such a contract; it must be a studied, intentional, prolonged, and continued inattention to the application of one party calling upon the other to observe that contract. Looking at the circumstances of this case altogether, recollecting that the application was only made by the plaintiff in April last, and even admitting, that some of the letters, as has been insisted, may amount to contracts binding on the plaintiff, the question is, whether it was not known who were really partners? I do not mean to say, that there has been such an exact performance of the contract as there ought to be; and these gentlemen will do well (if they mean to protect themselves from the interference of this Court) to use all the names in the concern, — they must do that, or the Court will be under the necessity of awarding an injunction, or dissolving the partnership." The motion was refused without costs. As to whether the right to use the partnership firm, after the death of one partner, belongs to the survivor, or is a part of the good-will of the partnership, see ante, § 100, and Lewis *v.* Langdon, 7 Sim. R. 127. See also Webster *v.* Webster, 3 Swanst. R. 490, n. In Miles *v.* Thomas (9 Sim. R. 607), Sir Launcelot Shadwell (the Vice-Chancellor) thought, that an injunction might be granted, whenever the act complained of is one that leads to the destruction of the partnership property, notwithstanding a dissolution thereof may not be prayed.

debts, precisely in the same relation to them, as if he were a third person, who was a debtor thereto.[1]

§ 204. In the next place, partnership articles sometimes provide, that one or more of the partners shall exclusively manage and administer all the concerns thereof, or one or more particular departments of the business. In cases of this sort, courts of equity will uphold with a steady hand every such stipulation, and give it full effect during the continuance of the partnership, and inhibit the non-competent partners from intermeddling therewith.[2] And this is entirely in coincidence with the French law on the same subject; for by that law, where by the articles one or more partners are exclusively to administer the affairs of the partnership, the power is deemed irrevocable during the continuance of the partnership, and cannot be lawfully interfered with by the other partners.[3] The Roman law seems impliedly to have promulgated the same doctrine.[4] The Code of Louisiana has also made it a part of its own positive regulations.[5]

§ 205. In the next place, in partnership articles it is sometimes agreed, that the real estate and fixtures, belonging to the firm, shall not be treated as partnership property, as between the partners; but that all the partners shall have a several and individual interest therein. In such cases, the interests of the partners

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 141, 2d edit.; Akhurst v. Jackson, 1 Swanst. R. 89. See also Bury v. Allen, 1 Collyer, R. 607.

[2] Ante, § 173, 182, 193, 202; Collyer on Partn. B. 5, ch. 1, § 3, p. 753 to 759, 2d edit.

[3] Pothier, De Societé, n. 71, 72.

[4] Dig. Lib. 14, tit. 1, l. 1, § 13, 14; Pothier, Pand. Lib. 14, tit. 1, n. 4.

[5] Code of Louisiana (1825), art. 2838 to art. 2840.

will be treated throughout, as their several and separate estate; and of course, in cases of bankruptcy of the partners, it will be distributable to and among their separate creditors respectively, in preference to their joint creditors.[1] The rule is, or at least may be, different in cases of mere personal property, which still remains in the reputed ownership of the partnership, although it will be the same, if the property be clearly and exclusively in the ownership of one partner, as his separate personal property.[2]

§ 206. Connected with this stipulation is ordinarily another for an annual account, valuation, and balance of the moneys, stock in trade, and credits of the partnership, and also of the debts due by the partnership;[3] and sometimes also for an annual division of the profits, or of a portion thereof. The annual accounts, when so settled and balanced, are ordinarily held to be conclusive, unless some error is shown; and to guard against the opening of such accounts, upon suggested errors at distant periods, it is not unfrequently further provided, that such annual statements and settlements of the accounts shall be binding and conclusive upon all the parties, notwithstanding any errors, unless they are discovered in the lifetime of the partners, or during the term of the partnership.[4] But all such clauses are

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 141, 2d edit.; Id. B. 4, ch. 2, § 1, p. 595, 596, 600; Id. B. 2, ch. 1, § 2, p. 113; Smith v. Smith, 5 Ves. R. 189; Ex parte Smith, 3 Madd. R. 63.

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 141, 2d edit.; Id. B. 4, ch. 2, § 1, p. 595, 596, 600; Id. B. 2, ch. 1, § 2, p. 113; Smith v. Smith, 5 Ves. R. 189; Ex parte Smith, 3 Madd. R. 63; Collyer on Partn. B. 4, ch. 2, § 1, p. 596 to 605, 2d edit.

[3] Collyer on Partn. B. 2, ch. 2, § 2, p. 144, 145, 2d edit.

[4] See Collyer on Partn. B. 2, ch. 2, § 2, p. 145, 146, 2d edit.; Oldaker v. Lavender, 7 Sim. R. 239.

nugatory, in cases where the error has arisen from the fraud of any of the partners; for fraud will vitiate any, even the most solemn transactions.[1]

§ 207. Another usual stipulation on the articles is for a general account of all the partnership property and concerns, upon the dissolution or expiration of the partnership, which is followed up by another, pointing out the mode of winding up the concerns, and of dividing and distributing the partnership property and effects. This is generally provided for in one of two modes. One mode is, by a general conversion of all the partnership assets into cash, by a sale, and dividing the produce thereof, after providing for the payment of the debts of the firm, among all the parties, in proportion to their respective shares and interests. Another mode is by providing, that one or more of the partners shall be entitled to purchase the shares of the other at a valuation.[2] The former mode is that constantly adopted by Courts of Equity, in the absence of any express stipulations; the latter mode can be insisted upon, only when there is an express stipulation to that very effect.[3] A mere stipulation for the division of the partnership stock and effects, at the end of the partnership, will not be deemed by Courts of Equity sufficient to entitle one or more of the partners to purchase them at a valuation; but merely to provide for a division in the usual manner, by a sale.[4] The same rule of a sale is applied

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[1] See Collyer on Partn. B. 2, ch. 2, § 2, p. 145, 146, 2d edit.; Oldaker *v.* Lavender, 7 Sim. R. 239.

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 145, 146, 2d edit., which cites 7 Jarman's Convey. 31; Cookson *v.* Cookson, 8 Sim. R. 529.

[3] Ibid.; Wilson *v.* Greenwood, 1 Swanst. R. 471, 482; Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

[4] Collyer on Partn. B. 2, ch. 2, § 2, p. 146; Rigden *v.* Pierce, 6 Madd. R. 353; Cook *v.* Collingridge, Jacob's R. 607.

in all cases, where the mode prescribed by the partnership articles becomes impracticable, or cannot otherwise be fairly obtained.[1]

§ 208. Under the clause in the articles for the purchase at a valuation, upon the dissolution of a partnership, the question has arisen, whether that clause is applicable to a dissolution by bankruptcy. It has been thought that it is not, although the point has not expressly come under decision; but a strong inclination of opinion, in that direction, was expressed by Lord Eldon.[2] The question turns upon this, whether a man can, by contract, or otherwise, provide for a particular disposition of his property, in an event which deprives him of all disposing power over it, and vests that right in other persons.[3]

§ 209. We have already seen, that it is an implied

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[1] Cook v. Collingridge, Jacob's R. 607.

[2] Wilson v. Greenwood, 1 Swanst. R. 481, and the Reporter's note (a); Gow on Partn. ch. 5, § 3, p. 300, 3d edit.; Collyer on Partn. B. 2, ch. 2, § 2, p. 145, 146, 2d edit.; Post, § 396.—Mr. Swanston in his note says: "The following are some of the principal authorities applicable to this point. Lockyer v. Savage, 2 Str. 947; Roe v. Galliere, 2 T. R. 103; Ex parte Hill, Cook's Bankr. Law, 228; 1 Cox, 300; Ex parte Bennett, Cook's Bankr. Law, 229. In the matter of Murphy, 1 Schoale & Lefr. 44; Ex parte Henecy, cit. Ib.; in the matter of Meaghan, 1 Schoale & Lefr. 179; Dommett v. Bedford, 6 T. R. 684; 3 Ves. 149; Ex parte Cooke, 8 Ves. 363; Ex parte Henton, 14 Ves. 598; Ex parte Oxley, 1 Ball & Beat. 258; Higinbotham v. Holme, 19 Ves. 88; Ex parte Vere, 19 Ves. 93; 1 Rose, 281; Ex parte Young, 1 Buck, 179; 3 Madd. 124; Ex parte Hodgson, 19 Ves. 206. And see Brandon v. Robinson, 18 Ves. 429. The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law.

[3] Ibid.

duty and obligation of every partner, not to carry on any business inconsistent with, or contrary to the true interest of the partnership.[1] But this is often expressly provided for by a special stipulation in the partnership articles. Where the language is general, it will, of course, be construed to apply to all other business, injurious to, or interfering with the interest and business of the partnership. But if the stipulation be limited to engaging in the same business on the separate account of the partner, or to engaging in any other particularly specified business, during the continuance of the partnership, there, it would seem to leave the partner free to engage in any other than the excepted business, upon the known maxim of the law, that *Expressio unius est exclusio alterius.*[2]

§ 210. The like language, in partnership articles, will also, in some cases, be construed to import a prohibition to engage in the same trade, upon a withdrawal from the partnership, even when there are no express words to the purpose, but the prohibition arises by mere implication. Thus, where by the articles it was agreed, that the trade of the partnership (that of a brewer)

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[1] Ante, § 178, 179.

[2] Collyer on Partn. B. 2, ch. 2, § 2, p. 143, 2d edit.; Glassington *v.* Thwaites, 1 Sim. & Stu. 182.—Mr. Collyer (Collyer on Partn. B. 2, ch. 2, § 1, p. 142, 143, 2d edit.) has remarked: "If several persons enter into partnership, under a stipulation, that the copartners, or any of them, shall not, during the continuance of the copartnership, engage in any business otherwise than upon the account and for the benefit of the same copartnership; and, after the execution of the articles, one of the partners with the consent of the others becomes a partner in a separate firm, the articles of partnership, coupled with such consent, will not operate to make the other partners of the original firm partners also in the separate firm. But a person may, by the decree of a Court of Equity, become a partner in the separate business of his copartner, entered into without his consent, in violation of the articles."

should continue for eleven years, with a proviso, that if either of the parties should be so minded, upon giving six months' notice to the other, he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade upon his own account; it was held by the Court, that the party giving such notice, upon the true interpretation of the words, "to be at liberty to quit the trade and mystery of a brewer, &c." was not at liberty to engage in the brewery business on his own account, but was bound to quit it altogether.[1]

§ 211. So, where, upon the retirement of one of two partners from a partnership in trade, it was left to arbitrators to determine (among other things) what was to be paid to the retiring partner for the good-will of the trade; and the arbitrators, upon the understanding that the retiring partner would not set up the trade in the same street or vicinity, awarded to him a certain sum for his share of the good-will thereof, which was accordingly paid by the other partner; and he afterwards set up the trade in the same neighborhood; the Court, notwithstanding the arbitrators had laid no express restraint on the retiring partner, in their award, held, that he should be restrained by injunction from carrying on the trade there, as it was a violation of the implied parol understanding of all parties at the time.[2]

§ 212. *A fortiori*, an injunction will lie in a case, where, upon the withdrawal of a partner, it is agreed between the parties, that the business shall be carried on by the remaining partners alone, if such retiring partner should

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[1] Cooper v. Watson, 3 Doug. R. 413; s. c. 2 Chitty, R. 451.

[2] Harrison v. Gardner, 2 Madd. R. 198; Gow on Partn. ch. 2, § 4, p. 107, 3d edit.

act in any manner inconsistent with such an agreement. Thus, where the plaintiff and defendant had been partners in stage-coaches; and by an agreement on the dissolution of their partnership, it was stipulated, that the business, so far as it was carried on between Newbury and London, should belong to the plaintiff, and that the defendant should not carry on the business of coach proprietor between Newbury and London; the defendant afterwards set up a stage-coach, which began its journey at a place a few miles distant from Newbury, but travelled through Newbury to London. On a bill filed, and an affidavit in support thereof, Lord Eldon granted an injunction to restrain the defendant from carrying on the business between Newbury and London. So, where a company, in which A. and B. were partners, contracted with the Postmaster-General for the service of the mail, each partner supplying horses for a distinct part of the road; but in consequence of the bad manner, in which A. horsed the coach, the Postmaster-General had been frequently obliged to suspend the contract; it was held, that B. might maintain an injunction against A. to restrain him from interfering with B.'s portion of the road, upon the ground of the irreparable injury to the partnership, which would ensue from such an interference.[1]

§ 213. We have, also, already seen what the general rule of law is, as to the right and authority of a majority, or of a definite number, to direct and regulate the concerns of the partnership.[2] This subject, in cases of partnerships, composed of numerous persons, frequently constitutes a matter of a special provision in the arti-

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[1] Collyer on Partn. B. 2, ch. 3, § 5, p. 238, 2d edit.; Williams v. Williams, 1 J. Wils. Ch. R. 473, note; Anderson v. Wallace, 2 Molloy, R. 540.

[2] Ante, § 123 to 125.

cles; and so far as the provision extends, it will form the rule of the partnership.[1] But it will not be extended by implication to any collateral cases, although they may fall within the same, or even a greater, mischief.[2] Thus, for example, if it is intended, that, in cases of difficulty, the majority shall have power to wind up or sell the concern, the authority must be expressly given; for it will not be inferred from the general language of any provision, that the majority, or any definite number, shall have authority to direct and regulate the concerns of the partnership.[3] And in these, as in the like cases, the provision itself, so far at least as Courts of Equity may be called upon to enforce it, may be controlled, or waived by the acquiescence, or action, of the partners habitually in a different course.[4]

§ 214. Provision is, also, often made in partnership articles, for the expulsion of a partner for gross misconduct, or in case of insolvency, or bankruptcy, or other special enumerated cases. Of course, such a provision will govern in all cases to which it properly applies.[5] And where a provision is made for insolvency, the question may arise whether it means a technical insolvency under the insolvent debtor's act, or a mere inability to pay just debts, according to the common use of the phrase in commercial transactions. The latter, it should seem, is to be deemed the true sense.[6]

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 143, 144, 2d edit.

[2] Ibid.

[3] Ibid.; Chapple v. Cadell, Jacob's R. 537.

[4] Ante, § 192; Glassington v. Thwaites, 1 Sim. & Stu. 124; Jackson v. Sedgwick, 1 Swanst. R. 460.

[5] See the late important case of Blisset v. Daniel, 23 Eng. Law & Eq. R. 105.

[6] Collyer on Partn. B. 2, ch. 2, § 2, p. 151, 152, 2d edit.; Parker v.

§ 215. It is also usual to insert in articles of partnership, a stipulation that disputes and controversies between the partners shall be referred to arbitrators, to be named by the respective partners. It seems, that no action at law is maintainable for a breach of any stipulation of this sort, as it is against the policy of the common law, and has a tendency to exclude the jurisdiction of the Supreme Courts, which are provided by the Government with ample means to entertain and decide all legal controversies.[1] Besides; there is this additional difficulty, that it would be impracticable for the party to establish at the trial, that, upon such an arbitration, he would have succeeded, so as to entitle him to damages.[2] In either view, the stipulation would seem to be nugatory and futile. But be this as it may, it is very clear, that no stipulation of this sort will be decreed to be specifically performed by a Court of Equity; not merely upon the ground of public policy, but also upon the ground of the utter inadequacy of arbitrators to administer entire justice between the parties, from a defect of power in them to examine under oath, and to compel the production of papers, as well as upon the ground of the utter impracticability of

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Gossage, 2 Cromp. Mees. & Rosc. 617; Biddlecome v. Bond, 4 Adol. & Ellis, R. 332.

[1] Gow on Partn. ch. 2, § 3, p. 72, 89, 3d edit.; Figes v. Cutler, 3 Stark. R. 139; Collyer on Partn. B. 2, ch. 3, § 1, p. 165, 166, 2d edit.; Kell v. Hollister, 1 Wils. R. 129; Watson on Partn. ch. 7, p. 383, 2d edit. [The more recent cases in England establish the doctrine, that an agreement to submit a controversy to arbitration before a suit is brought, is binding upon the parties making it. See Scott v. Avery, 8 Exch. 487; 5 H. L. Cas. 811; Livingston v. Ralli, 5 El. & Bl. 132; Russell v. Pelligrini, 6 El. & Bl. 1020.]

[2] Ibid.; Tattersall v. Groote, 2 Bos. & Pull. 131; Street v. Rigby, 6 Ves. 815, 818.

a Court of Equity's compelling a suitable performance of such a stipulation between the parties.[1] But, under

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[1] Collyer on Partn. B. 2, ch. 3, § 1, p. 165 to 168, 2d edit.; Street *v.* Rigby, 9 Ves. 815, 817, 818; Tattersall *v.* Groote, 2 Bos. & Pull. 131, 135, 136; Wellington *v.* McIntosh, 2 Atk. 569; Gow on Partn. ch. 2, § 4, p. 103, 104, 3d edit.; 1 Story on Eq. Jurisp. § 670.—In the case of Street *v.* Rigby, 6 Ves. 815, Lord Eldon discussed the subject at large, upon a covenant of this nature, and said: "It has occurred to me, that in almost every case of this sort, the parties have adopted a fancy, that they can make any thing, in the contemplation of the court fit to be considered matter of dispute, upon which they think proper to dispute. That is not so. It must be that which a Court will say is fairly and reasonably made matter of dispute. Another circumstance is, that the parties do not frequently appreciate the effect of such a covenant. First, at law, in the case in the Court of Common Pleas, the Judges, Heathe and Rooke, seemed to think it futile, and tantamount to a covenant to forbear suit. I take notice of the circumstance, as material with regard to Halfhide *v.* Fenning; for if the meaning of a covenant to refer is to forbear suit altogether, that covenant to refer, before you bring suit, and to suspend it in the mean time, would stand upon principles, *pro tempore*, that, it would be very difficult to say, do not apply to both those covenants. Suppose an action brought. The question would be, what the damages would have been, if the defendant had joined, and named an arbitrator, and evidence had been produced (and what would be, could by no means be correctly proved), and an award had been made, giving some supposed sum, which no proof could ascertain. The effect, therefore, of such a covenant is, that, as the damages are not to be ascertained by evidence, nominal damages only can be got. Whose fault is it? There are prudential ways of drawing these articles. There might have been an agreement for liquidated damages, to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for a specific performance. If they had enforced their legal remedy by such a stipulated security, it would be very difficult to say, they would also have a remedy in equity. In the case from Astley's Theatre (Astley *v.* Weldon, 2 Bos. & Pul. 346), there was no dispute in the Court of Common Pleas, that the actress might have agreed upon a liquidated sum to be forfeited for non-attendance, &c. The Court were of opinion, very properly, that where there was a stipulated sum in the covenant, that was the stipulated damages; and the general sum of £200 for breach of any of the articles was a penalty; but it was not doubted that sum might have been made the liquidated damages, if they thought proper. The party must put himself in a situation to have substantial damages. In this case,

a clause of this nature, where the partners do actually refer matters to arbitrators, questions may arise as to

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upon an action, they could have only 1*s*.; for they could not ascertain what more they were to have. Then, what can they have in equity? There is considerable weight as evidence of what the law is, in the circumstance, that no instance is to be found of a decree for specific performance of an agreement to name arbitrators; or that any discussion upon it has taken place in experience for the last twenty-five years. I was counsel in Price *v.* Williams (3 Bro. C. C. 163; 1 Ves. Jun. 365), a case which justifies considerable doubts, whether the *eulogia* upon the domestic forum of arbitrators are well founded. That was a case in Lord Thurlow, upon a bill for specific performance of such an agreement, sending parties to arbitrators, who might or might not be able to come to a decision; and Lord Thurlow was of opinion that the Court would not perform such an agreement. The Court, if it is not part of the agreement, cannot give them authority to examine upon oath; and the agreement itself cannot authorize any person to administer an oath. A difficulty arises from the want of the conscience of the party. This Court has given credit to itself, notwithstanding what has passed in the Court of King's Bench, in their rules upon attachments, as likely to decide as well as arbitrators; and it requires a strong case to deprive a person of the right to a decision here. In Price *v.* Williams, the account came back very favorably to my client; the result being, that a very small sum was due from him. A vast number of exceptions were taken; and the Court felt that sort of difficulty of dealing with the exceptions, that led to an arbitration; though at first the Court would not hear of it; and the party, who had not been able to establish any thing before the Master, in that mode gained several thousand pounds. Then the difficulty occurred about the power of this Court to review the decision of arbitrators; and in the end my client fared much worse than he would have done before the Master. That case and others led me to adopt a rule never to advise an arbitration afterwards. If such a bill never has been usually filed in this Court, and if in that instance Lord Thurlow was of opinion it could not be maintained, the jurisdiction would stand upon principles not very intelligible, if a party, who by the imbecility belonging to the covenant could recover only 1*s*. damages in an action, coming to this Court for substantial justice, to have an account taken, that person, who could not file a bill for a specific execution of the agreement to refer, can say, that though he admits, neither of them could recover more than 1*s*. at law, and he cannot demand the relief by way of a specific performance, he can have it by pleading the covenant, if he is brought in the character of a defendant; and can compel the other to go to that tribunal, to which the defendant, coming in the character of plaintiff, could not oblige him to resort. It is very

the nature and extent of the matters upon which the arbitrators may make their award. Thus, for example,

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difficult to say, that should be the law of the Court. Then, is it so? I look upon the case of Wellington *v.* McIntosh as an authority, that at that time it was not the law of the Court. At that period the distinction, taken in later cases, had not obtained; that the plea, though it might have been good as to the relief, is bad, if bad as to the discovery. As to that, the course of the later authorities seems to have altered the law of pleading. But *quoad* such a point as this, the plea, if good to the relief, must be good to the discovery; for this plea means this, if any thing; that the parties will not harass themselves by going to Courts of Justice; but will state to each other what is in dispute, and refer that to arbitrators; and entering into such a covenant they must be taken to mean, that they will be content with a decision upon such discovery as arbitrators can compel, without subjecting each other to the necessity for either to be examined upon oath before arbitrators, who cannot examine them upon oath. They choose, therefore, that forum, exclusive of the jurisdiction of the country to all intents and purposes; meaning that arbitrators shall, from beginning to end, do that which they are enabled to do, viz., to decide between them as well as they can. It would be a breach of covenant, that would entitle them to nominal damages, to file a bill for discovery, as much as a bill for discovery and relief. In Halfhide *v.* Fenning, the whole of my argument, according to the report, amounts to taking the distinction between discovery and relief, and putting the case upon that distinction; and if it was so argued, I am not surprised, that Lord Kenyon should take it, that the counsel thought, if not put upon that, it could not be supported. But it is not to be put upon that distinction, but upon the ground I have stated. It is said, courts of law think these agreements very wise. Kill *v.* Hollister, however, shows, that courts of law are ready enough to say the agreement of the parties shall not oust their jurisdiction; though they permit it to oust the jurisdiction of courts of equity. But they enforce the agreement, not as agreement, but by granting an attachment for breach of the rule. It is dealing a little imperiously to say, that an agreement which, made out of Court, would not bar an action, if made in Court, shall bar a bill. It was justly observed upon the passage in Atkyns (Wellington *v.* McIntosh, 2 Atk. 569), that arbitrators cannot administer an oath; and the agreement will not enable them. We see in daily practice at law, the Court administers the oath; and under that the parties go before the arbitrators. It is said, the party must have discovery some way. But if the distinction cannot be maintained between a bill for discovery only, and for both discovery and relief, it must be said, they are bound to go first before the arbitrators; and the party must be brought there, and must refer; the parties to be examined upon honor, for they cannot upon oath; and then it is said, as in the argument of these cases, if it so turns out,

if there should be a submission to arbitrators of all matters in difference between the partners, the question

then they are come to this Court; saying, there is then a failure of the justice, for which they covenanted; and therefore there is a jurisdiction in this Court. Till Halfhide v. Fenning no such decree was ever heard of. Next, expressing it in terms of the highest respect and veneration for that noble and learned person, now no more, I doubt whether it is a very wise exercise of the jurisdiction of this Court, recollecting, that it is to give a relief beyond the law, not to order the parties to go to law to take the effect of the stipulated remedy, but under a positive covenant, not a negative covenant, that they will not sue (upon which there would be considerable difficulty), to send them by way of experiment to that jurisdiction, so likely to miscarry, under the circumstance that it has not, unless received under the authority of the Court, a power to administer an oath, where the justice that tribunal can render is so insufficient, though they have not expressly bound themselves by covenant; and, whether the Court would not act more discreetly by saying, they are in a Court, where justice can certainly be done; and as they have not stipulated to the contrary, their fate shall be decided here, instead of sending them to so improvident a tribunal. I recollect passages, in which Courts of Justice, however full of *eulogia* upon these domestic forums, have recollected their own dignity sufficiently to say, they would not be ancillary to those forums; that the parties should not be permitted to take their relief from them, coming here for discovery. It is enough for me to say, it is not a necessary consequence of a covenant to refer, that the party thereby agreed to forbear to sue. I do not enter into the question of the effect at law of a covenant to forbear to sue. But, supposing it good, in strict law it cannot be maintained, that having covenanted to refer, the party has covenanted to forbear to sue; and if not, he has only left himself open to an action for damages, if he does not refer; which the suit does not prevent, if thought advisable. It would be very strong to say, that, where the legal remedy they have provided for themselves is utterly incompetent to justice, this Court is precluded from granting its ordinary remedy by a covenant, which does not in terms express an undertaking not to resort to this Court, and must hold that doctrine upon a plea; in that shape permitting the defendant to have in substance a specific performance, which would have been refused to him as a plaintiff; at the hazard of doing substantial injustice, of a delay of justice almost of necessity, and where the examination cannot be addressed to the conscience of either the parties or the witnesses; from which the subject cannot be debarred, unless by express terms, or necessary implication. That this has not the effect of barring the legal remedy, is clear from the cases at law, which agree that it is still competent to him to take the legal remedy. Then why not the equitable? The competency to take both

may arise, whether it is within the competency of the arbitrators to award a dissolution of the partnership; and it has been held, that they may.[1] So, upon a like broad submission, and also giving authority to arbitrators to dissolve the partnership, upon such terms and conditions as they might prescribe, it has been held, that the arbitrators may provide, that, upon the dissolution, one partner shall not carry on the trade within

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stands upon the same principle." See also Wilks *v.* Davis, 3 Meriv. R. 507. Mr. Collyer has remarked (Collyer on Partn. B. 2, ch. 3, § 1, p. 167, 168); "This leads us to a more general consideration of clauses of this nature. There are many covenants, to which such clauses may be added with effect; but there are others, the breach of which does not admit of compensation by liquidated damages, and to which, therefore, they cannot properly be applied. Thus, on the one hand, if the covenant be such, that the breach of it must of necessity be uncertain in its nature and amount, then, if liquidated damages be reserved, they will be deemed the real damages, and a verdict in an action on the covenant will be found for the amount of the liquidated damages. On the other hand, if the breach of covenant be attended with certain damage, as, for instance, if it consist in the omission to pay a certain sum of money, in such case, although liquidated damages be reserved *eo nomine*, they will be considered by a jury only in the nature of a penalty, and the real damages will be measured by the sum omitted to be paid. In a late case, even where the real damage was uncertain, yet, as it was evidently far less than the amount of the liquidated damages, the Court of Common Pleas, although the language in which the liquidated damages were agreed to be paid was the strongest that could be employed, referred it to the prothonotary, to ascertain what damages, if any, the plaintiff had sustained, and how much, if any thing, ought to be paid to the plaintiff. Mr. Jarman, in commenting upon this case, observes, that, upon the reasoning there adopted by the Court, it is obvious, that a covenant to pay a sum of money as liquidated damages, on the breach of any one of a series of stipulations, must in all cases be nugatory, as the covenant necessarily embraces acts of various degrees of importance, all which cannot with equal justice be compensated for by the payment of the same sum; if it were sufficient in regard to some, it must be excessive as to others; the consequence is, that, in order to give an effectual remedy for the recovery of a sum of money as stipulated damages in such a case, a distinct and separate amount should be assessed, as the measure of compensation on the breach of each several contract."

[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 152, 2d edit.; Green *v.* Waring, 1 Wm. Black. 475.

a particular prescribed distance of the place where the remaining partners are to carry it on.[1] So, upon a general submission by partners of all actions, notes, accounts, dealings, controversies, and demands, in law or equity, it has been held, that it is competent for the arbitrators to award that one of the partners shall take all the joint property, he paying to the other a sum in gross, and also discharging all the partnership debts.[2]

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[1] Collyer on Partn. B. 2, ch. 2, § 2, p. 152, 2d edit.; Green *v.* Waring, 1 Wm. Black. 475; Morley *v.* Newsome, 5 Dowl. & Ryl. 317.

[2] Byers *v.* Van Deusen, 5 Wend. R. 268.

CHAPTER XI.

REMEDIES BETWEEN PARTNERS.

§ 216. THESE are the most material considerations, which seem proper to be brought before the learned reader, as to the true interpretation and construction of partnership articles, so far as they have, as yet, come under judicial cognizance and decision. They are necessarily imperfect; but at the same time they may serve, in some degree, as lights and guides, to direct our inquiries in analogous cases, and to point out the difficulties to be surmounted, as well as the defects to be avoided.

§ 217. The next inquiry naturally presented is, as to the remedies, which belong to partners themselves, either at law or in equity, during the continuance of the partnership, either to enforce the particular stipulations, contained in the articles of partnership, or other duties and obligations which arise by operation and implication of law. A full examination of this topic properly belongs to a treatise on remedies and pleadings at law and in equity, and is beside the purpose of the present Commentaries; but it may be found discussed at large in elementary works, devoted to the consideration of remedies at law and in equity.[1] It may not, however, be without use to bring together, in this place, some general suggestions and doctrines applicable to

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1 See Collyer on Partn. B. 2, ch. 3, § 1, p. 162 to Id. § 5, p. 257, 2d edit.; Gow on Partn. ch. 2, § 3, p. 69 to § 4, p. 116, 3d edit.

the subject, which may serve to explain other decisions, or to clear away lurking doubts.

§ 218. Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either assumpsit, or covenant, as the case may require, will ordinarily lie, to recover damages for the breach thereof.[1] In many cases, indeed, such damages may be merely nominal, and inadequate for redress. But still we must take the law as we find it; and in such cases, as in some other relations in life, we enter into the connection for better or for worse.[2]

§ 219. It is sometimes laid down by elementary writers, that, during the continuance of the partnership, an action at law will lie by one partner against the others, for moneys advanced, or paid, or contributed, on account of the partnership, or of the debts and obligations incurred thereby.[3] But this doctrine, in the general terms in which it is laid down, is utterly untenable, and incon-

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[1] Gow on Partn. ch. 2, § 3, p. 69 to 73, 3d edit.

[2] Collyer on Partn. B. 2, ch. 2, § 1, p. 131, 2d edit.; Goodman *v.* Whitcomb, 1 Jac. & Walk. 569, 572; Wray *v.* Hutchinson, 2 Mylne & Keen, 235; 1 Story on Eq. Jurisp. § 659 to 665; Gow on Partn. ch. 2, § 3, p. 69 to 93, 3d edit. — The action of account seems properly applicable only to cases where the partnership is ended. See 1 Story on Eq. Jurisp. § 659 to 665; Gow on Partn. ch. 2, § 3, p. 68, 69, 70; Id. p. 73, 74, 3d edit.; Wray *v.* Milestone, 5 Mees. & Welsb. 21; Foster *v.* Alanson, 2 Term R. 479; Duncan *v.* Lyon, 3 Johns. Ch. R. 351, 361, 362. Actions of tort can scarcely be maintained at law by one partner against the other, touching the partnership property; even if one partner should wilfully destroy the property. Gow on Partn. ch. 2, § 3, p. 89 to 93, 3d edit.; Collyer on Partn. B. 2, ch. 3, § 8, p. 257, 268, 2d edit. The appropriate remedy seems to be in equity.

[3] See Gow on Partn. ch. 2, § 3, p. 79, 80, 81, citing Abbott *v.* Smith, 2 W. Black. R. 947, and what was said by Lord Kenyon in Merryweather *v.* Nixon, 8 Term R. 186, and by Mr. Justice Bayley in Ansell *v.* Waterhouse, 6 Maule & Selw. 390, and Holmes *v.* Williamson, 6 Maule & Selw. 158. See also 1 Montagu on Partn. ch. 4, p. 50; Cary on Partn. 65; Hamilton *v.* Hamilton, 6 Harris, 20.

sistent with the rights, and duties, and relations of the partners with each other.[1] It is true, that one partner

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[1] Most of the cases which are supposed to inculcate this doctrine, turn upon other very distinct grounds. They are nearly all summed up in Mr. Collyer's valuable Treatise. Collyer on Partn. B. 2, ch. 3, § 2, p. 174 to p. 193. They are cases, (1.) where either the debt was a separate debt and not a partnership debt. Smith v. Barrow, 2 Term R. 476; Gow on Partn. ch. 2, § 3, p. 75, 76, 77, 3d edit. (2.) Or, a separate and distinct security, or negotiable instrument, was given by one partner to another, on the partnership account. Preston *v.* Strutton, 1 Anstr. R. 50; Venning *v.* Leckie, 13 East, R. 7; Gridley *v.* Dole, 4 Comst. 486. (3.) Or, where the contract was preliminary to the partnership, and merely in contemplation of it; such as a promise to contribute so much to the partnership funds, in stock or money. Gale *v.* Leckie, 2 Stark. R. 107; Venning *v.* Leckie, 13 East, R. 7; Helme *v.* Smith, 7 Bing. R. 709; Vance *v.* Blair, 18 Ohio, 532. (4.) Or, where the case is one of part-owners or joint-contractors, and not of partners. Helme *v.* Smith, 7 Bing. R. 709; Graham *v.* Robertson, 2 Term R. 282; Sadler *v.* Nixon, 5 Barn. & Adol. 936; French *v.* Styring, 40 Eng. Law & Eq. R. 274; 2 J. Scott, s. c. 357. (5.) Or, where the money or funds have been voluntarily separated from the partnership stock or moneys, and appropriated to one partner, and he alone is interested in a contract touching the same. Coffee *v.* Brian, 3 Bing. R. 54; Jackson *v.* Stopherd, 2 Cromp. & Mees. 361; Wilson *v.* Cutting, 10 Bing. R. 436; Sharp *v.* Warren, 6 Price, R. 132. (6.) Or, where a balance has been struck, and a separate promise made to pay the same to one partner. Moravia *v.* Levy, 2 Term R. 483, note; Foster *v.* Alanson, 2 Term R. 479; Preston *v.* Strutton, 1 Anst. R. 50; Brierly *v.* Cripps, 7 Carr. & Payne, 709; Wray *v.* Milestone, 5 Mees. & Welsb. 21; Henley *v.* Soper, 8 Barn. & Cresw. 16; Winter *v.* White, 1 Brod. & Bing. R. 350. See also Gow on Partn. ch. 2, § 3, p. 69 to 97, 3d edit.; Fromont *v.* Coupland, 2 Bing. R. 170; Carr *v.* Smith, 5 Adol. & Ell. New R. 128, 138. But the mere fact that an account has been taken and balance struck between partners at a certain period during the partnership, would not entitle any partner to maintain an action therefor, unless agreed to generally by all the partners. See Morrow *v.* Riley, 15 Ala. 710. In Carr *v.* Smith, 5 Adol. & Ell. New R. 138, Lord Denman said: "The case of Fromont *v.* Coupland, and other similar cases, seem to limit the action to a settlement of accounts on a final close of all partnership transactions; but this case does not necessarily raise that question; for at all events the settlement, in order to ground an action, must be one which is binding and conclusive upon the partners. Now it does not appear here that the adjustment and settlement was ever agreed to by all the partners, nor indeed by the plaintiff and the testator; if, therefore, it were binding and conclusive on them, it must have been so by reason of the power confided to the

may maintain an action at law against the other partners, or any one or more of them, for moneys advanced, or paid, or contributed, at their request, for their separate and distinct account and benefit. But this is upon the plain ground, that it has no connection with the partnership concerns and liabilities; and that the transactions or contracts are between the parties in their several, distinct, and independent capacities, separate from the partnership. For there is no incompetency in partners to enter into contracts with each other, as individuals, in matters *dehors* the partnership concerns and business.[1] But this is very different from the case of a partner's entering into contracts with the partnership, as such, or of his paying moneys, or incurring liabilities on account thereof, he being in all such cases one of the parties in interest, and, as such, bound jointly with the others to contribute towards the discharge of the common obligations of the partnership.[2] [In a late English case A. B. & C. were shareholders in a join-tstock mining company, and money being necessary to carry on

persons who drew it up, and in that case it would be an award, and required a stamp. It would come within the authority of Jebb *v.* McKierman, rather than within Boyd *v.* Emmerson, Sybray *v.* White, and similar cases."

[1] Gow on Partn. ch. 2, § 3, p. 75, 76, 3d edit.; Coffee *v.* Brian, 3 Bing. R. 54; Smith *v.* Barrow, 3 Term R. 476; Nockels *v.* Crosby, 3 Barn. & Cresw. 814; Collyer on Partn. B. 2, ch. 3, § 2, p. 175 to 178, 2d edit.; 1 Story on Eq. Jurisp. § 664 to 666; Watson on Partn. ch. 8, p. 394 to 409, 2d edit.

[2] Gow on Partn. ch. 2, § 3, p. 77, 78, 79; Holmes *v.* Higgins, 1 Barn. & Cresw. 74; Milburn *v.* Codd, 6 Barn. & Cresw. 419; Caldicott *v.* Griffiths, 22 Eng. Law & Eq. R. 527; Neale *v.* Turton, 4 Bing. R. 149; Teague *v.* Hubbard, 8 Barn. & Cresw. 345; Geddes *v.* Wallace, 2 Bligh, R. 270; Collyer on Partn. B. 2, ch. 3, § 2, p. 174 to 178, 2d edit.; Worrall *v.* Grayson, Tyrwh. & Grang. R. 477, 480; s. c. 1 Mees. & Welsb. 166; Brown *v.* Tapscott, 6 Mees. & Welsb. 119, 123; Bovill *v.* Hammond, 6 Barn. & Cresw. 149; Pearson *v.* Skelton, 1 Mees. & Welsb. 504; s. c. Tyrwh. & Grang. R. 848; Sadler *v.* Nixon, 5 Barn. & Adol. 936; Haskell *v.* Adams, 7 Pick. 59; 1 Story, Eq. Jurisp. § 679, 680, 681.

the mine, a loan was made upon the joint and several promissory note of the three, and applied to the use of the mine. A. being compelled to pay the whole note, was allowed to sue the others for contribution.[1] So, also, if partners, by an express agreement, separate a distinct matter from the partnership dealing, and one party expressly agrees to pay the other a specific sum for that matter, assumpsit will lie on that promise, although the matter arose from their partnership dealing.[2]]

§ 220. This doctrine is not confined to cases of moneys paid, or debts incurred, or contributions made, by one partner on account of liabilities of the partnership, resulting from contracts binding the same; but it equally applies to moneys paid, and debts incurred, and contributions made, by one partner on account of negligences and torts, affecting the partnership.[3] In the ordinary course of things there is not, indeed, as is well known, any right of contribution allowed by the common law between joint wrong-doers, where one has paid the whole damages or expenses occasioned thereby.[4] And this rule is just as applicable to partners as to other persons.[5] But, then, the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction

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[1] Sedgwick v. Daniel, 2 Hurl. & Norman, 319.

[2] Collamer v. Foster, 26 Vermont, 754.

[3] Pearson v. Skelton, 1 Mees. & Welsb. 504; s. c. Tyrwh. & Grang. R. 848.

[4] Merryweather v. Nixon, 8 Term R. 186.

[5] Pearson v. Skelton, 1 Mees. & Welsb. 504; s. c. Tyrwh. & Grang. R. 848.

or inference of law.[1] In the latter case, although not in the former, there may be, and properly is, a contribution allowed by law, for such payments and expenses between the constructive wrong-doers, whether partners, or not.[2] Still, however, the same difficulty occurs at law in such cases of constructive torts, as in cases of contracts; and no remedy at law is maintainable therefor between the partners. The remedy, as we shall presently see, must be administered in another tribunal.[3]

§ 221. The ground, why at law, independent of any special covenant, or any distinct several contract, one partner cannot maintain a suit against the other partners, for moneys paid, or advanced, or contributed, or liabilities incurred, on account of the partnership [or for neglect of the partnership business[4]], may be readily explained in a satisfactory manner. In the first place, upon the mere technical principles of the common law, one partner cannot sue the others

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[1] Adamson v. Jarvis, 4 Bing. R. 66.

[2] Ibid.

[3] Pearson v. Skelton, 1 Mees. & Welsb. 504; s. c. Tyrwh. & Grang. R. 848.—In this case Mr. Baron Parke is reported, in Tyrwh. & Granger, 850, 851, to have said: "How were the profits divided? Did the partners divide the net profits, after the payment of all expenses, or the gross profits according to the number of miles that each partner horsed the coach? If the latter was the case, there was no common fund, and you will be entitled to a rule; but if there was a partnership fund, out of which losses were to be paid, your remedy is in equity. We will consult the Lord Chief Justice, and ascertain what evidence he has upon his notes, as to the existence of a partnership fund. With respect to the first objection taken at the trial, it does not apply." On a subsequent day Parke B. said, "that on consulting the notes of the Lord Chief Justice, it appeared that there was a partnership fund, out of which the expenses were first to be paid, and the residue divided among the partners; consequently the nonsuit was right." See Ante, § 61, and note.

[4] Capen v. Barrows, 1 Gray, 376.

for a contribution or payment made for a just partnership liability; for in such a suit all the partners, including himself, must be made defendants; and it is clear, upon the acknowledged principles of pleading at the common law, that a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself, either alone, or in conjunction with others.[1] But a reason, far more satis-

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[1] Collyer on Partn. B. 2, ch. 3, § 2, p. 188 to p. 193, 2d edit.; Bosanquet *v.* Wray, 6 Taunt. R. 597; Moffat *v.* Van Millingen, cited 2 Bos. & Pull. 124, note; Mainwaring *v.* Newman, 2 Bos. & Pull. 120; De Tastet *v.* Shaw, 1 Barn. & Ald. 664; Neale *v.* Turton, 4 Bing. R. 149; Teague *v.* Hubbard, 9 Barn. & Cresw. 532; Brown *v.* Tapscott, 6 Mees. & Welsb. 119, 123; Holmes *v.* Higgins, 1 Barn. & Cresw. 74; Malyne's Lex Merc. p. 310; Niven *v.* Spikeman, 12 Johns. R. 401; 1 Story, Eq. Jurisp. § 664, 665, 679; Jones *v.* Yates, 9 Barn. & Cresw. 532; Rawlinson *v.* Clarke, 15 Mees. & Welsb. R. 292; Cruikshank *v.* McVicar, 8 Beavan, R. 106. — In this respect the Roman law, the law of France, and the law of Scotland, present a marked contrast to the common law. In the jurisprudence of each of these latter countries, the firm is treated, in its aggregate capacity, as having an independent existence, somewhat like a *quasi* corporation; and the firm may, therefore, sue and be sued, by a single partner, without any repugnancy, exactly as a member of a corporation may sue and be sued by the corporation itself. In this respect there is an analogy to the proceedings in our Courts of Equity, where one partner is entitled to sue all the other partners, for an adjustment of the partnership concerns, or for any transactions growing out of the same concerns. Mr. Bell (2 Bell, Comm. B. 7, p. 619, 620, 5th edit.) states the Scottish law as follows. "Some lawyers have considered the obligation of the company as only the joint and several obligations of the partners. But this is not correct in the law of Scotland. The partnership is held as, in law, a separate person; capable of maintaining independently the relations of debtor and creditor. As a separate person, the company is known and recognized in obligations and contracts by its separate name or firm, as its personal appellation. But it cannot hold feudal property in the social name. It is a consequence of this separate existence of the company as a person, that an action cannot directly, and in the first instance, be maintained against a partner for the debt of the company. The demand must be made, first, against the company; or the company must have failed to pay, or have dishonored their bill, before the partner can be called on. It also follows that the partners are guarantees or sureties for

factory, because it is in no shape founded upon technical principles, is, that until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount. Now, a settlement of all the partnership concerns is ordinarily, during the continuance of the partnership, unattainable at law; and even in equity it is not ordinarily

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the company; not proper or principal debtors. And so, although diligence may proceed against the partners directly, the company having failed to pay according to their obligation; and although personal diligence necessarily can proceed only against the individuals, the estate of the partner can, in bankruptcy, be charged only with the balance remaining due, after what may be drawn from the company estate. Another consequence is, that the creditors of a partner, if they would attach his share, must arrest in the hands of the company as a separate person. Action or diligence seems to be legally competent by a company firm, or against the partnership by its firm; though personal execution, of course, is possible only against the individuals. But so many doubts have been raised of late on these points, that the safer course is to use the names of the partners. Sequestration of the company's estate proceeds in the name of the firm. In England, a doctrine prevails, which does not accord with the law of Scotland, and which, perhaps, is to be ascribed to a difference of principle, on the point now under discussion. At law, in England, there can be no debt between two partnerships, of each of which one person is a partner; and this on the ground, that 'no man can contract with himself, and, therefore, cannot bind himself in the society of one set of persons to another, in which he is also a partner.' It is allowed that the contract is available in equity, but not in law. In Scotland, debts between companies, in which the same individual is partner, are every day sustained as quite unexceptionable." See Pothier, De Societé, n. 135, 136. The Roman law, while it ordinarily gave the action pro socio only in cases of a dissolution of the partnership, excepted special cases. Nonnunquam necessariam est, et manente societate, agi pro socio; veluti, cum societas, vectigalium causâ, coita est, propterque varios contractus neutri expediat recedere a societate, nec refertur in medium, quod ad alterum pervenerit. Dig. Lib. 17, tit. 2, l. 65, § 15; Id. l. 52; Pothier, Pand. Lib. 17, tit. 2, n. 33.

enforced, except upon a dissolution of the partnership. If one partner could recover against the other partners the whole amount paid by him on account of the partnership, they would immediately have a cross action against him for the whole amount, or his share thereof; and if he could recover only their shares thereof, then, in order to ascertain those shares, a full account of all the partnership concerns must be taken, and the partnership itself wound up. This would manifestly be a most serious inconvenience, as well as a change of the original contract, from a joint contract of all the partners, *in solido*, to a several contract, each for his own aliquot part of the final balance, due to a particular partner upon a special transaction.[1] And in cases of this sort the maxim may justly apply: *Frustra petis, quod statim alteri reddere cogeris:*[2] or, as it is sometimes expressed, *Frustra peterit, quod mox rediturus esset.*[3]

§ 222. But, although, in cases of the sort above mentioned, no remedy lies at law, yet in equity an appropriate remedy may and will be granted, wherever it is *ex æquo et bono* necessary and proper; for, in equity, there is no difficulty in one partner's suing the other partners for money advanced, or contributions made, or liabilities incurred, simply on the ground that it has its foundation in a partnership transaction, if in other respects the suit is unobjectionable, as no technical difficulty occurs in equity, as to the joinder of all the proper

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[1] Collyer on Partn. B. 2, ch. 3, § 2, p. 174 to p. 193, 2d edit.; Harvey v. Crickett, 5 Maule & Selw. 336; Gow on Part. ch. 2, § 3, p. 69 to p. 77, 3d edit.; Id. ch. 2, § 4, p. 93 to p. 102.

[2] Branch, Maxims, p. 51, Amer. Edit. 1824; Jenkins, Cent. 256.

[3] Collyer on Partn. B. 2, ch. 3, § 2, p. 175, 2d edit.; 1 Story on Eq. Jurisp. § 664.

parties to the suit.[1] Indeed, the ordinary remedy now administered, in matters of account, or requiring an account between partners, is exclusively in equity.[2] But this subject, which is rarely if ever acted upon in Courts of Equity, except upon a dissolution of the partnership, will more appropriately occur in another place.[3]

§ 223. The Roman law did not to the same extent or precisely in the same manner as our law, recognize the distinction between remedies at law and remedies in equity, although it is very clear, that an analogous distinction, between suits in the ordinary forum, and suits *ex æquo et bono* before the Prætor's forum, was well understood, and fully acted upon. But, in cases of partnership, owing to the complicated nature thereof, a special remedy was provided, commonly called the *Actio pro socio*, the nature, character, and operation whereof are fully explained in the Digest.[4]

§ 224. And, here, a question of a local and general nature may arise, when, and under what circumstances, and to what extent, Courts of Equity will interfere to

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[1] Collyer on Partn. B. 2, ch. 3, § 2, p. 174 to p. 193, 2d edit.; Id. ch. 3, § 7, p. 245 to p. 249; Abbott *v.* Smith, 2 Wm. Black. 947; Gow on Partn. ch. 2, § 4, p. 93 to p. 102, 3d edit.; 1 Story, Eq. Jurisp. § 666 to 674; Id. § 679, 680; Pearson *v.* Skelton, 1 Mees. & Welsb. R. 504; s. c. Tyrwh. & Grang. R. 848.

[2] Collyer on Partn. B. 2, ch. 3, § 4, p. 197 to p. 232, 2d edit.; Duncan *v.* Lyon, 3 Johns. Ch. R. 351, 361, 362, 363; Gow on Partn. ch. 2, § 3, p. 73, 74, 3d edit.; Id. ch. 2, § 4, p. 93 to p. 102.

[3] Ibid.; Post, § 228, 229; Forman *v.* Homfray, 2 Ves. & Beam. 329; Harrison *v.* Armitage, 4 Madd. R. 143; Richards *v.* Davies, 2 Russ. R. 347; Loscombe *v.* Russell, 4 Sim. R. 8; Knebell *v.* White, 2 Younge & Coll. 15; Glassington *v.* Thwaites, 1 Sim. & Stu. 124, and the Reporter's notes (a) and (b); Natusch *v.* Irving, Gow on Partn. App. 398, 3d edit.; Wallworth *v.* Holt, 4 Mylne & Craig, 519, 635, 639.

[4] Dig. Lib. 17, tit. 2, l. 31, 32, 33, 34, &c.; Pothier, Pand. Lib. 17, tit. 2, n. 30 to n. 54.

enforce either the express or implied duties and obligations of partners *inter sese*. In respect to such duties and obligations as are of a positive and personal nature, it seems difficult to perceive how Courts of Equity can enforce a specific performance of them; and, therefore, in case of a breach thereof, the injured party must be left to his remedy, if any, at law.[1] But the same objection does not seem to apply to cases where the relief sought is to enforce the due observance of negative duties and obligations; for, here, all that is required is, that the Court should restrain the partner from violating them; or, in other words, from doing acts which violate the express or implied obligation which he is under to forbear. Thus, for example, although a Court of Equity could not compel a partner to bestow his skill, and diligence, and services faithfully in the partnership business, yet it may interpose by injunction to restrain him from wasting the partnership property, from misusing the partnership name, from interfering to stop the partnership business, or from fraudulent practices injurious or ruinous to the partnership, in violation of his express duties or express contracts.[2]

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[1] Kemble *v.* Kean, 6 Sim. R. 333; Clarke *v.* Price, 1 Wils. Ch. R. 157; Kimberley *v.* Jennings, 6 Sim. R. 340; Downs *v.* Collins, 6 Hare, R. 418; Collyer on Partn. B. 2, ch. 2, § 2, p. 142, 2d edit.; Id. B. 2, ch. 2, § 1, p. 131; 2 Story, Eq. Jurisp. § 722 *a*.

[2] Ibid.; Collyer on Partn. B. 2, ch. 3, § 5, p. 233 to 240, 2d edit.; Id. B. 2, ch. 2, § 2, p. 142; 3 Kent, Comm. Lect. 43, p. 60, 4th edit.; Miles *v.* Thomas, 9 Sim. R. 606. — The comments of the Vice-Chancellor (Sir L. Shadwell) on this subject, in Kemble *v.* Kean (6 Sim. R. 333), are so important, that they deserve to be cited at large. "In the case of a mere contract between two persons, who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the party contracted with intends to carry on his trade, the whole agreement is of so genuine a kind, that the Court would enforce the performance of the agreement by restraining the party by injunction from breaking the agreement so made.

§ 225. A few illustrations of the general doctrine may be here properly introduced. Courts of Equity,

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In the case where the parties are partners, and one of the partners contracts that he shall exert himself for the benefit of the partnership, though the Court, it is true, cannot compel a specific performance of that part of the agreement, yet, there being a partnership subsisting, the Court will restrain that party (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement. That is in case of a partnership. In the case of Morris *v.* Colman (18 Ves. 437), the bill was filed by Morris against Colman for the purpose of having a question upon the articles of partnership determined, and for restraining Colman from doing many acts which he was disposed to do; and I think, in that case (for I was counsel for Colman from the beginning to the end), that Colman always stood on the defensive. The only question was, whether Colman should be at liberty to do certain acts, which he insisted he was at liberty to do, and Morris contended that he was not. Now, I apprehend, that what Lord Eldon says, in giving his judgment upon that point, must be taken with reference to the subject that was before him; and I perfectly well recollect the time when the injunction was granted to restrain Mr. Colman, but I am not quite sure it is exactly in the way in which the report represents. But Colman insisted, generally, that he had a right to write dramatic pieces for other theatres; and then there was an injunction granted to restrain the representation of one of the pieces which he had written, and which was intended to be represented, I think, at Covent-garden theatre. In the argument it was said, that the particular provision which is stated in the case, was a provision restraining Colman from writing dramatic pieces for any other theatre; and in the argument it was said by the counsel for the plaintiff, that that provision was no more against public policy, than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged, would have been. Now, with reference to what was said by counsel, upon arguing the case of a partnership, Lord Eldon says: 'If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the talents of each other?' That mode of putting the question appears to me to show, that Lord Eldon is speaking of a case where the parties are in partnership together; because it would be a strange thing that one should contract to perform only at the Haymarket theatre, and the other to write for that theatre alone, except in the case of a partnership, where both parties would be exerting themselves for their mutual benefit; because, if they were not in partnership, the effect of such an agreement might be, that neither might exert his talents at all. In this case, however, there is no partnership whatever between the proprietors of Covent-garden theatre and Mr. Kean;

in interfering by way of injunction in cases of partnership, act upon a sound discretion, and will not

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but the contract is nothing more than this, that Mr. Kean shall, for a given remuneration, act a certain number of nights at Covent-garden theatre, with a proviso, that in the mean time he shall not act at any other theatre. And it is quite clear, that this bill is filed for the purpose of having the performance of an agreement with regard to his contract to act. [His Honor here stated the substance of the bill, and then proceeded;] — So that it was an agreement to act at Covent-garden theatre, a certain number of nights in the season, 1830–31, and that, in the mean time, the defendant should not act in London; and the bill is filed for the purpose of enforcing the performance of that agreement, which mainly consists in the fact of his acting; and it appears to me, that it is utterly impossible that this Court can execute such an agreement. In the first place, independently of the difficulty of compelling a man to act, there is no time stated, and it is not stated in what characters he shall act; and the thing is altogether so loose, that it is perfectly impossible for the Court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the Court, as to the performance of the agreement; and, supposing Mr. Kean should resist, how is such an agreement to be performed by the Court? Sequestration is out of the question; and can it be said, that a man can be compelled to perform an agreement to act at a theatre by this Court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process, which this Court is enabled to issue; and, therefore (unless there is some positive authority to the contrary), my opinion is, that, where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this Court, and it is only guarded by a negative provision, this Court will leave the parties altogether to a court of law, and will not give partial relief by enforcing only a negative stipulation. I think, for the reasons which I have stated, that what Lord Eldon has said in the case of Morris *v.* Colman bears upon this case. In Clark *v.* Price, 2 J. Wilson's C. C. 157 (in which, also, I was counsel), there was a positive stipulation, by Price, that he would write reports for Clark the bookseller. Lord Eldon says, in his judgment, upon that case: 'The case of Morris *v.* Colman is essentially different from the present. In that case, Morris, Colman, and other persons were engaged in a partnership in the Haymarket theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. Colman had entered into an agreement, which I was very unwilling to enforce, not that he would write for the Haymarket theatre, but that he would not write for

interfere to remedy any breaches of duty, unless they are of such a nature, as may produce permanent injury to the partnership, or involve it in serious perils or mischiefs in future. A mere fugitive, temporary breach, involving no serious evils or mischiefs, and not endangering the future success and operations of the partnership, will, therefore, not constitute any case for equitable relief.[1] It is upon this ground, that Courts of Equity will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances between the parties; but will deem, as in some other more important relations in life, that the parties enter into them with a fair understanding, that such infirmities are to be borne with,

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any other theatre. It appeared to me, that the Court could enforce that agreement by restraining him from writing for any other theatre. The Court could not compel him to write for the Haymarket theatre; but it did the only thing in its power; it induced him, indirectly, to do one thing by prohibiting him from doing another. There was an express covenant on his part, contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for, if this contract is one, which the Court will not carry into execution, the Court cannot, indirectly, enforce it by restraining Mr. Price from doing some other act.' His Lordship then proceeds to observe upon the express terms of the contract, and says, that he will not, in that case, interfere to enforce an implied, negative stipulation; for that is the utmost that can be made of his Lordship's observations in that case. For the reasons, which I have stated, I am of opinion, that, if this cause were now being heard, and the agreement were admitted to be such, as it appears to be, this Court could not make any decree, but must dismiss the bill." See 2 Story on Eq. Jurisp. § 958, and note (4.) See also the doctrine of the Roman law on this subject (Ante, § 182), where it is stated, that the action *pro socio* for an account did not lie until after a dissolution of the partnership; but it did in certain special partnerships, such as a partnership for collection of the public revenue. (*Causâ Vectigalium.*)

[1] Collyer on Partn. B. 2, ch. 3, § 5, p. 236, 2d edit.; Charlton *v.* Poulter, 19 Ves. 148, n.; Goodman *v.* Whitcomb, 1 Jac. & Walk. R. 592; Miles *v.* Thomas, 9 Sim. R. 606, 609.

and that a separation of interests, or an injunction against acts is not to be decreed, because one of the parties is more sullen or less good-tempered than the other.[1]

§ 226. It was upon the same ground of the fugitive or temporary nature of the breach of the stipulation, that, where a covenant in the partnership articles provided, that the business should be carried on in the joint names of all the partners, and that all contracts and engagements on account of the trade, and all checks and drafts drawn by them, and all receipts of money paid, should be in the joint names of all the partners, and some of them afterwards refused to fulfil the covenant, and to add the name of the plaintiff to certain contracts, entered into for and on account of the firm, the Court refused to interfere by way of injunction.[2]

§ 227. On the other hand, where one partner has improperly involved the partnership in debt, or has himself become insolvent, or has otherwise grossly misconducted himself, Courts of Equity will interpose, and restrain him from drawing, accepting, or indorsing, bills or notes in the name of the firm, or from contracting, or receiving partnership debts.[3] So, an injunction will be granted against a partner, who grossly and wantonly obstructs, injures, or prevents the carrying

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[1] Goodman *v.* Whitcomb, 1 Jac. & Walk. 572; Collyer on Partn. B. 2, ch. 2, § 2, p. 131, 2d edit.; Ante, § 218.

[2] Marshall *v.* Colman, 2 Jac. & Walk. 268.

[3] Collyer on Partn. B. 2, ch. 3, § 5, p. 233, 234, and note (b), 2d edit.; Williams *v.* Bingley, 2 Vern. R. 278, Mr. Raithby's note; Master *v.* Kirton, 3 Ves. Jr. R. 74; Lawson *v.* Torgan, 1 Price, R. 303; Hood *v.* Aston, 1 Russ. R. 412; Gow on Partn. ch. 2, § 4, p. 108, 109, 3d edit.; 1 Story, Eq. Jur. § 667; Miles *v.* Thomas, 9 Sim. R. 606.

on of the partnership business;[1] or who designedly misapplies the property of the partnership to purposes not warranted by the articles or the objects of the trade.[2] If, therefore, a partnership negotiable security is misapplied to the payment of the separate debt of one partner, an injunction will be granted to restrain its further negotiation, and to require it to be restored to the partnership, or cancelled, as the case may require, unless, indeed, it has passed into the hands of a *bonâ fide* holder, without notice of the misapplication.[3]

§ 228. Independently of the administration of relief by Courts of Equity in the cases to which we have alluded, they will, it seems, in some instances, interpose and appoint a receiver of the joint effects, during the continuance of the partnership. But to authorize

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[1] Charlton *v.* Poulter, 19 Ves. 149, note (c).

[2] Glassington *v.* Thwaites, 1 Sim. & Stu. R. 124, and the Reporter's note (a).

[3] Collyer on Partn. B. 2, ch. 3, § 5, p. 233 to 236, 245, 2d edit.; Hood *v.* Aston, 1 Russ. R. 412, 413; Ante, § 132; Jervis *v.* White, 7 Ves. R. 513; Gow on Partn. ch. 2, § 4, p. 108, 109, 3d edit.; Littlewood *v.* Caldwell, 11 Price, R. 97; 1 Story, Eq. Jur. § 667, 669. — In Hood *v.* Aston (1 Russ. R. 412, 415), Lord Eldon said: "The mere circumstance, that a partner gives a partnership bill for his separate debt, may, or may not, lay a ground for the issuing of an injunction against its negotiation; for the person who takes it, may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But, where it appears, that an individual partner, indebted to the partnership, being unable to pay his separate bill, holden by his bankers, substitutes for it, by a negotiation with them, a partnership security, made and given without the consent or knowledge of his copartners, and the bankers are aware, that it is so given without their consent or knowledge; — that is a case, which comes within the principle, upon which the Court has always been in the habit of interfering by injunction. Where a partnership negotiable security has been misapplied by a partner, if it is in the hands of a third person as holder, and relief is sought against him, he also, as well as the offending partner, should be made a party to the bill. See Collyer on Partn. B. 2, ch. 3, § 7, p. 245, 246, 2d edit.

a partner to call for the appointment of a receiver of the stock of a subsisting partnership, he must be prepared to show a case of the grossest abuse and the strongest misconduct on the part of the managing partner; for, except under such circumstances, the Court will not interfere, inasmuch as the probable result of its interposition will be the destruction of the trade. Nor will a receiver be appointed upon a summary application, where there is a covenant to refer, and no attempt has been made to submit the matter in dispute to arbitration. But if, in the ordinary course of the trade, any of the partners seek to exclude another from taking that part in the concern, which he is entitled to take, the Court will grant a receiver; because such conduct will warrant a dissolution. The principle, indeed, upon which the Court of Chancery interferes between partners, by appointing a receiver, is merely with a view to the proper relief, by winding up and disposing of the concern, and dividing the produce, and not for the purpose of carrying on the partnership.[1]

§ 229. But in all cases of this sort, where an injunction is sought to restrain improper acts by a partner, a very serious question may arise, whether the Court will interfere, unless the bill not only asks for an injunction, but also for a dissolution of the partnership.

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[1] Gow on Partn. ch. 2, § 4, p. 114, 3d edit. — I have cited almost the very language of Mr. Gow, on this occasion. He cites Oliver v. Hamilton, 2 Anst. 453; Milbank v. Revett, 2 Meriv. 405; Waters v. Taylor, 15 Ves. 10; Wilson v. Greenwood, 1 Swanst. R. 481; Charlton v. Poulter, 19 Ves. 148, note (c); and Walworth v. Holt, 4 M. & Craig, R. 619, 635, 639. See also Bailey v. Ford, 13 Sim. R. 495; Whitewright v. Stimpson, 2 Barbour, R. 379; Wolbert v. Harris, 3 Halst. Ch. R. 605; Blakeney v. Dufaur, 15 Eng. Law & Eq. R. 76; Parkhurst v. Muir, 3 Halst. Ch. R. 307; Speights v. Peters, 9 Gill, 472.

Indeed, it has been a matter of no small diversity of judicial opinion, how far a Court of Equity ought to interfere in such cases, unless for the purpose of dissolving the partnership and winding up the whole concern; since it may involve the Court in perpetual controversies to enforce the observance of the articles, as often as, during the long continuance of a partnership, any specific breach may occur; which is a species of jurisdiction, which Courts of Equity are not at all disposed to entertain.[1] [And it is now the established

[1] Marshall v. Colman, 2 Jac. & Walk. 266; Gow on Partn. ch. 2, § 4, p. 111 to 113, 3d edit.; Collyer on Partn. B. 2, ch. 3, § 5, p. 236, 237, 238, 2d edit.; Goodman v. Whitcomb, 1 Jac. & Walk. 569, 572; Loscombe v. Russell, 4 Sim. R. 8; Knebell v. White, 3 Younge & Coll. 15; Bentley v. Bates, 4 Engl. Jurist, 552; Gow on Partn. Suppl. 1841, p. 24, 25; 1 Story, Eq. Jur. § 671. — On this point Mr. Gow (Gow on Partn. ch. 2, § 4, p. 111, 112, 3d edit.) says: "Courts of Equity will likewise interfere, where a breach of any of the covenants, contained in the articles of partnership, has been committed, if the breach be so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership. One case of constant occurrence, falling under this head of equitable relief, is that of a partner raising money for his private use on the credit of the partnership firm. In a case so circumstanced, the Court interposes, because there is a ground for dissolving the partnership. But then the impending danger must be such, there must be that abuse of good faith between the members of the partnership, that the Court will try the question, whether the partnership should not be dissolved in consequence. Thus, where it has been covenanted, that all contracts entered into by any of the firm, and all checks, bills, and receipts for money, should be signed in the joint names of all the partners, a Court of Equity will restrain one partner from entering into any engagement in the name of 'himself and company,' or 'himself and partners,' or will dissolve the partnership. Were the Court not to lay down this rule for its guidance, separate suits might be successively instituted, praying for perpetual injunctions in respect of the breach of each particular covenant, which is a species of jurisdiction the Court has never decidedly entertained. So, if one partner exclude another from the benefits of the concern, the Court will interfere and dissolve the partnership; and it assumes a jurisdiction on this ground, that if the partners will not allow the partnership to be carried on in the manner in which it ought to be, it is a reason for putting an end to it altogether. Neither will a Court of Equity

practice of Courts of Equity not to interfere and appoint a receiver, unless the object of the suit is to

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assist in the management of the affairs of a company during its existence; but if a sufficient case is made out to justify its interposition, it will appoint a manager in the interim, for the purpose of winding up and putting an end to the concern. But although the general principle of the Court is not to interfere in a partnership concern, unless the bill prays a dissolution; yet there are cases of partnership for a term of years, in which it has been said the Court will interpose during the term, notwithstanding a dissolution be not prayed. Thus, where some of the members of a partnership or company seek to embark one of their body in a business, which was not originally part of the partnership concern, and they are unable to show that such partner either expressly or tacitly acquiesced in the proposed extension of the concern, a Court of Equity would, it is apprehended, restrain them from proceeding in the execution of their intention, without dissolving the partnership or company. So, where a member of a firm neglected to enter the receipt of partnership money in the books, and did not leave the books open for the inspection of the other partners, equity interfered without dissolving the partnership. So, where there has been a studied, intentional, prolonged, and continued inattention to the application of one partner calling upon the other to observe the contract of partnership, the Court will grant an injunction against the breach of it. And, in general, circumstances of the latter description must be disclosed, to induce a judicial interference on a breach of the articles of partnership, unless a dissolution be prayed."

Mr. Collyer (Collyer on Partn. B. 2, ch. 3, § 5, p. 236) says: "It seems clear, that a Court of Equity will sometimes award an injunction against one partner, without dissolving the partnership; perhaps even where the delinquency of that partner is not sufficient to warrant a dissolution. At any rate, it certainly seems to have been held, that a Court of Equity will restrain the gross personal misconduct of a partner, without compelling a dissolution of the partnership before the expiration of the term. In Charlton *v.* Poulter (19 Ves. 148, n.) a bill was filed by Richard Charlton, senior, and junior, partners in a brewery, charging great misconduct by the defendant, the third partner, in disobliging and turning away the customers, prevailing on the servants to leave the brewhouse, assaulting and obstructing them, causing them to quit their service, locking up the books, retaining as servants (without the plaintiff's consent) bruisers and boxers, who obstructed the trade, threatening to ruin the trade, and refusing to account. The bill prayed, that, at the end of the partnership, the stock and utensils might be valued, and that the defendant might be compelled to receive one third part of the value, and for an injunction restraining the

obtain a dissolution of the partnership.[1]] It is very certain, however, that, pending the partnership, Courts

defendant from any act to the obstruction or the damage of the trade. On motion, after answer, for an injunction, it was ordered, that the defendant be restrained from using force, either by himself or any other person or persons, to the obstruction or interruption of the brewing trade in question, and from removing or displacing any of the servants hired or employed by the partners, or the major part of them, in carrying on the trade, without leave of the Court; and from carrying away or removing out of the counting-house belonging to the partnership any partnership books or papers relating to the said trade; and upon the plaintiff's submission, it was further ordered, that the plaintiffs be restrained in like manner. The opinion, that a partner's misconduct may be restrained by injunction, without the necessity of a dissolution, is sanctioned by Lord Eldon in the case of Goodman *v.* Whitcomb (1 Jac. & Walk. 572). The parties in that case being partners in the business of carpet manufacturers, the bill was filed for a dissolution of the partnership, and the usual accounts. One of the grievances stated in the bill was, that the defendant had sold goods at an under price, and exchanged others for household furniture, which he had appropriated to his own use. Lord Eldon said, that trifling circumstances of conduct were not sufficient to authorize the Court to award a dissolution. It was stated, that the defendant had exchanged carpets for household furniture; that, perhaps, might be an improper act; but still there might be a thousand reasons why the Court should not do more than restrain him in future from so doing; more particularly, as it was stated by the answer, that he did it, because he thought it the best thing that could be done. A Court of Equity, however, will be reluctant to award an injunction against a partner, unless there be grounds for a dissolution; and in many cases such a course would be attended with obvious inconvenience to the parties. [See Hall *v.* Hall, 3 Eng. Law & Eq. R. 191.] Marshall *v.* Colman, 2 Jac. & Walk. 266. And cases may arise where an injunction cannot with propriety be granted, whether the parties do, or do not, contemplate a dissolution of the partnership, and even though the party, against whom the injunction is sought, may have acted contrary to the spirit of the partnership arrangements. Thus, two persons agreed to work a coach from Bristol to London, one providing horses for a part of the road, and the other for the remainder. In consequence of the horses of one having

[1] Hall *v.* Hall, 3 Eng. Law & Eq. R. 191.—Though the Court *might* depart from this rule, if it were shown that unless a receiver was appointed, the partnership concern would be probably destroyed by acts of the defendant. And see Roberts *v.* Eberhardt, 23 Eng. Law & Eq. R. 245.

of Equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern.[1]

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been taken in execution, the other provided horses for that part which had been undertaken by the first. He afterwards persisted in providing horses for the whole journey, and claimed the whole profits. Upon a motion for an injunction to restrain him from so working the coaches, Lord Eldon refused the injunction. 'It is difficult,' said his Lordship, 'to understand, how such a case can be the proper subject of the jurisdiction of this Court by injunction. If I enjoin the defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the plaintiff from not bringing horses there. ' I cannot restrain the defendant, unless I have the means of assuring him that he shall find the plaintiff's horses ready. I should otherwise enjoin him from doing that, which if he omits to do, he will be liable to actions by every person whom he has undertaken to convey from Bristol to London.' Smith *v.* Fromont, 2 Swanst. 330. In this case Lord Eldon said, that a question might arise, whether the plaintiff, showing, that his horses were always ready, would not be entitled to the same profit, as if they were used." See also Wilson *v.* Greenwood, 1 Swanst. R. 481, where Lord Eldon said, that in the ordinary course of trade, if any one partner seek to exclude another from taking that part in the concern, which he is entitled to take, the Court will grant a receiver. Mr. Collyer understands this declaration as applicable to cases where a dissolution is not sought. Collyer on Partn. B. 2, ch. 3, § 6, p. 240, 241, 2d edit. [But this was shown not to be the true construction of that case, by the Lord Chancellor in Hall *v.* Hall, 3 Eng. Law & Eq. R. 196.]

In the case of Loscombe *v.* Russell (4 Sim. R. 8), the Vice-Chancellor (Sir L. Shadwell) said: "I take this to be a bill, which purposely avoids the prayer for a dissolution; and that it was not in the contemplation of the plaintiff, that the partnership should be put an end to. It would, therefore, be a surprise upon the parties to this record, if I were to deal with it, as if a dissolution were sought. Here the partnership is still subsisting; and the bill is filed for an account merely of the dealings and transactions of the partnership. With respect to the law of this Court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord Eldon upon this subject has been, from time to time, expressed both before and since the decision of Harrison *v.* Armitage. Suppose that the Court would entertain a bill like the pres-

[1] Richardson *v.* Bank of England, 4 M. & Craig, 165, 172, 173; Post, § 348, n.

§ 230. The Roman law contained doctrine, which in some measure proceeded upon similar considerations.

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ent, and direct an account to be taken of the dealings of a partnership, and that it appeared, by the Master's report, that a balance was due from the defendant to the plaintiff; then, upon further directions, the plaintiff would ask for an order, that the balance might be paid to him; it would, however, be competent to the defendant to file a supplemental bill, in order to show, that, since the account was taken, a balance had become due to him from the plaintiff, after giving the plaintiff credit for the amount found due to him by the Master; and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year, that the partnership continued, and a balance would never be ascertained until the partnership expired, or the Court put an end to it. This Court will not always interfere to enforce the contracts of parties; but will, in some instances, leave them to their remedy at law; as in the cases of agreements for the purchase of stock, or for the building of houses. With respect to occasional breaches of agreements between partners, when they are not of so grievous a nature, as to make it impossible that the partnership should continue, the Court stands neuter. But when it finds, that the acts complained of are of such a character as to show, that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the Court will decree it, although it is not specifically asked. Here a dissolution is not prayed for; and, if the Court were to do what is asked, it would not be final. Having regard, then, to the opinion expressed by Lord Eldon, both before and after the decision in Harrison *v.* Armitage, my settled opinion is, that this bill cannot be maintained; and, therefore, the demurrer must be allowed." In the recent case of Miles *v.* Thomas (9 Sim. R. 606, 609), the same learned Judge said: "I am of opinion, that the Court ought to interfere between copartners, whenever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed."

Lord Cottenham in the recent case of Walworth *v.* Holt, 4 M. & Craig, 619, 635, 639, said: "When it is said that the Court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties; and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be, — the one binding the Court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the

Ordinarily the action *Pro Socio* did not lie to enforce a right to a general account between partners until after

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partners should be parties to a bill praying it, — that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for, as I have said upon other occasions, I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which the Court has, in many cases, dispensed with the presence of the parties who would, according to the general practice, have been necessary parties. In Cockburn *v.* Thompson, Lord Eldon says, 'A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application;' and again, 'The difficulty must be overcome upon this principle, that it is better to go as far as possible towards justice than to deny it altogether.' If, therefore, it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this Court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so; but in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the equity claimed by this bill than there is against it. It is true that the bill does not pray for a dissolution, and that it states the company to be still subsisting; but it does not pray for an account of partnership dealings and transactions, for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred; but its object is to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice. But whether the interest of the plaintiffs, in right of which they sue, arises from such responsibility or from any other cause, cannot be material; the question being, whether some partners, having an interest in the application of the partnership property, are entitled, on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this Court for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced

a dissolution of the partnership. But in special cases, as for example, in cases where the partnership was for

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against other persons, whether trustees and agents for the company, or strangers being possessed of property of the company, it may be asked why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder? In Chancey *v.* May, the defendants were partners. In the Widows' Case, before Lord Thurlow, cited by Lord Eldon, the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In Knowles *v.* Houghton, 11th July, 1805, reported in Vesey, but more fully in Collyer on the Law of Partnership, the bill prayed an account of partnership transactions, and that the partnership might be established; and the decree directed an account of the brokerage business, and to ascertain what, if any thing, was due to the plaintiff in respect thereof; and the Master was to inquire whether the partnership between the plaintiff and the defendant had at any time, and when, been dissolved; showing that the Court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In Cockburn *v.* Thompson, the bill prayed a dissolution; but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection that the others were not parties. In Hichens *v.* Congreve, the bill was on behalf of the plaintiff and the other shareholders, against other shareholders who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain funds alleged to have been improperly abstracted from the partnership property by the defendants; and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In Walburn *v.* Ingilby, the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed. In Taylor *v.* Salmon the suit was by some shareholders, on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company, which he had appropriated to himself; and the Vice-Chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case and Hichens *v.* Congreve differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue, whereas in the present, though not dissolved, it is unable to carry on the purpose for which it was formed, an inability to be attributed in part to the withholding that property which this bill seeks to recover. So far this case approximates to those in which the partnership has been dissolved; as to which it is admitted that this Court exercises its jurisdiction. This case also differs from the two last-mentioned cases in this, that the difficulty in which the plaintiffs are placed,

the collection of the public revenue (*causâ vectigalium*), which partnership was held, on grounds of public pol-

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and the consequent necessity for the assistance of this Court, is greater in this case; — no reason, certainly, for withholding that assistance. How far the principle upon which these cases have proceeded is consistent with the doctrine in Loscombe *v.* Russell, 'that in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter, will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested that the supposed rule, that the Court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases, and to a certain extent, has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle. It is, however, certain, that this supposed rule is directly opposed to the decision of Sir J. Leach, in Harrison *v.* Armitage, and Richards *v.* Davies. Having referred to so many cases, in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say any thing as to the objection for want of parties; and as to the assignees of those shareholders who have become bankrupts, those assignees are now shareholders in their places, for the purpose of any interest they have in the property of the company; and, as such, are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled, in Taylor *v.* Salmon, as to the shares of Salmon. Upon the authority of the cases to which I have referred, and of the principle to which I have alluded, if it be necessary to resort to it, I am of opinion that the demurrer cannot be supported; and that the usual order, overruling a demurrer, must be substituted for that pronounced by the Vice-Chancellor." [See this case explained, in Hall *v.* Hall, 3 Eng. Law & Eq. R. 196.]

In Fairthorne *v.* Weston, 3 Hare, R. 387, 391, Mr. Vice-Chancellor Wigram said: "The argument for the defendant turned wholly upon the proposition, that a bill praying a particular account is demurrable, unless the bill seeks and prays a dissolution of the partnership; in support of which, the case of Loscombe *v.* Russell, and the cases there cited, were relied upon. That there may be cases to which the rule there laid down is applicable, I am not prepared to deny, but the law as laid down in that case was never admitted to be a rule of universal application. Harrison *v.* Armitage, Richards *v.* Davies. And the unequivocal expression of the opinion of Lord Cottenham, in Taylor *v.* Davies and Walworth *v.* Holt, of the Vice-Chancellor of England, in Miles *v.* Thomas, and of Lord Langdale, in Richardson *v.* Hastings, shows that there is no such universal rule at the present day;

icy, not to be dissolved, even by the death of one partner, contrary to the common rule of that law, as to general partnerships,[1] an action *pro socio* lay for an account during the existence of the partnership. *Nonnunquam necessarium est, et manente societate, agi pro socio. Veluti quum societas, vectigalium causâ coita est (propterque varios contractus neutri expediat recedere a societate), nec refertur in medium, quod ad alterum pervenerit.*[2]

§ 231. Independently of the relief, which Courts of Equity are thus disposed to grant by way of injunction, in order to prevent, suppress, or redress acts of misconduct, and breaches of duty, and positive engagements by any one partner, during the continuance of the partnership, there is another auxiliary authority, which is sometimes granted, and which, indeed, in many cases, is indispensable to the complete protection and security of the other partners, and that is, by the appointment of a receiver to collect the debts and receive the assets of the partnership.[3] But this course is rarely advisable, and indeed is never granted by Courts of Equity, unless where a case is made out of such gross abuse, and misconduct on the part of one partner, that a dissolu-

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and I cannot but add, that it is essential to justice that no such universal rule should be sustained. If that were the rule of the Court, — if a bill in no case would lie to compel a man to observe the covenants of a partnership deed, — it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract." See also 1 Story, Eq. Jurisp. § 667 to 672.

[1] Dig. Lib. 17, tit. 2, l. 65, § 9; Id. l. 59; Pothier, Pand. Lib. 17, tit. 2, n. 56, 57.

[2] Dig. Lib. 17, tit. 2, l. 65, § 15; Pothier, Pand. Lib. 17, tit. 2, n. 33; Ante, § 182, 221, note (3).

[3] Collyer on Partn. B. 2, ch. 3, § 6, p. 240 to 244, 2d edit.; Ante, § 228, 229. See Bailey *v.* Ford, 13 Simons, R. 495.

tion ought to be decreed, and the affairs of the partnership wound up.[1]

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[1] Collyer on Partn. B. 2, ch. 3, § 6, p. 240 to 243, 2d edit.; Gow on Partn. ch. 2, § 4, p. 114, 3d edit. — Mr. Gow has well summed up the leading doctrines upon this subject, in a passage, a part of which has been already cited (Ante, § 228). He says: "Independently of the administration of relief by a Court of Equity, in the cases to which we have alluded, it will, it seems, in some instances, interpose; and, during the continuance of a partnership, appoint a receiver of the joint effects. But to authorize a party to call for the appointment of a receiver of the stock of a subsisting partnership, he must be prepared to show a case of the grossest abuse, and of the strongest misconduct, on the part of the managing partner; for, except under such circumstances, the Court will not interfere, inasmuch as the probable result of its interposition is the destruction of the trade. Oliver *v.* Hamilton, 2 Anstr. 453; Milbank *v.* Revett, 2 Meriv. 405. In a note to the case of Glassington *v.* Thwaites, 1 Sim. & Stu. 130, it is questioned by the learned reporters, whether the Court will ever interfere on an interlocutory application for a receiver or injunction, in the case of a partnership, occasioned by the acts of the parties, unless on circumstances clearly established, of fraud, entire exclusion, or gross misconduct. Nor will a receiver be appointed upon a summary application, where there is a covenant to refer, and no attempt has been made to submit the matter in dispute to arbitration. Waters *v.* Taylor, 15 Ves. 10. But if, in the ordinary course of trade, any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver, because such conduct warrants a dissolution. Wilson *v.* Greenwood, 1 Swanst. 481; S. C. 1 J. Wilson, 223. See also Read *v.* Bowers, 4 Bro. C. C. 441; Charlton *v.* Poulter, 19 Ves. 148, n. (c). The principle, indeed, upon which the Court of Chancery interferes between partners, by appointing a receiver, is merely with a view to the relief, by winding up and disposing of the concern, and dividing the product, but not for the purpose of carrying on the partnership. Waters *v.* Taylor, 15 Ves. 10. Therefore, a receiver of a partnership will not be appointed upon motion, unless it appear that the plaintiff will be entitled to a dissolution at the hearing; for otherwise the Court might make itself the manager of every trade in the kingdom. Goodman *v.* Whitcomb, 1 Jac. & Walk. 589; Chapman *v.* Beach, Ib. 594; Harrison *v.* Armitage, 4 Madd. 143. And where it seems absolutely necessary that a receiver should be appointed of partnership property, the Court will always pause before it takes a step likely to be so ruinous to the parties. Waters *v.* Taylor, 15 Ves. 10; Peacock *v.* Peacock, 16 Ves. 57. A Court of Equity, on an application properly substantiated, will appoint a receiver of a mine or colliery, as well as of an ordinary partnership in trade; because where persons have different interests in such a subject, and manufacture and bring to market the

§ 232. To the foregoing enumeration of cases of remedial justice, administered by Courts of Equity between partners, during the partnership, or in contemplation of the dissolution thereof, may be added the cases, in which relief will be granted, where the partnership has been entered into by one partner, under circumstances of gross fraud or gross misrepresentation by the others; for in such cases Courts of Equity will not only decree the same to be void, but will also interpose and restore the injured party to his original rights and property, as far as is practicable.[1] In cases of this sort, Courts of

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produce of the land as one common fund, to be sold for their common benefit, it is to be regarded rather as a species of trade or partnership, than as a mere tenancy in common in the land. Jefferys *v.* Smith, 1 Jac. & Walk. 298; Story *v.* Lord Windsor, 2 Atk. 630; Crawshay *v.* Maule, 1 Swanst. 518; s. c. 1 J. Wils. 181; Williams *v.* Attenborough, 1 Turner, 73; Feredy *v.* Wightwick, 1 Tamlyn, 250. But if the claimant to an equitable interest, in such a concern, knowingly suffers great expense and risk to be incurred before he asserts his equitable right, and, keeping aloof while the undertaking is hazardous, seeks the interposition of the Court only when it is attended with a profitable result, the Court will not interfere by appointing a receiver, on motion, and it is doubtful whether it would interpose in such a case, even by decree. Norway *v.* Rowe, 19 Ves. 144; Senhouse *v.* Christian, cited Ib. 157. In particular cases, equity will restrain the improper conduct of a partner without appointing a receiver. Seeley *v.* Boehm, 2 Madd. 176; but see Smith *v.* Fromont, 3 Swanst. 330, and Glassington *v.* Thwaites, 1 Sim. & Stu. 124. Where, by the partnership agreement, the concern was to be managed by a committee, the share of each proprietor dying or retiring, to be first offered to the committee, to be purchased for the general body, it was held, that the whole concern could not be sold but with the consent of all; and that, where all but two out of thirty-one had agreed, and sold the concern, such sale did not pass the share of such two; but in such a case there need be no previous offer to the committee. Chapple *v.* Cadell, Jac. 537." Gow on Partn. ch. 2, § 4, p. 114 to 116, 3d edit. See also Peacock *v.* Peacock, 16 Ves. 49; Oliver *v.* Hamilton, 2 Anst. 453; Richards *v.* Davies, 2 Russ. & Mylne, R. 347.

[1] Collyer on Partn. B. 2, ch. 3, § 7, p. 244, 245, 2d edit.; Gow on Partn. ch. 2, § 4, p. 107, 3d edit.; Tattersall *v.* Groote, 2 Bos. & Pull. 131; Ex parte Broome, 1 Rose, R. 69; Hamilton *v.* Stokes, 4 Price, R. 161; s. c. Daniel, R. 20; Oldaker *v.* Lavender, 6 Sim. R. 239; Green *v.* Barrett, 1 Sim. R.

Equity proceed upon the same general ground, as in other cases where a fraud has been perpetrated upon an innocent partner; as, for example, in the case already suggested, where one partner sold out to the other for an inadequate consideration, in consequence of the fraudulent concealment by the latter of the real state of the funds;[1] for fraud will infect with a fatal taint every transaction, however solemn; and good faith and confidence, and frank and honorable dealing are, or ought to be, emphatically the groundwork of all partnership engagements.

§ 233. Upon similar grounds, Courts of Equity[2] will hold each partner responsible to the other for all losses and injuries, sustained by his past misconduct, or negligences, or misapplication of the partnership funds or credit.[3] [Compensation will be given, substantially in the nature of unliquidated damages.[4] Hence, if any partner has withdrawn, or used the partnership funds or credit in his own private trade, or private speculations, he will be held accountable, not only for the interest of the funds so withdrawn, or credit misapplied, but also for all the profits which he has made thereby.[5] On the other hand, if there are any losses

45; Jones v. Yates, 9 Barn. & Cresw. 532.—If third persons are interested and connected with such frauds, they also should be parties to the bill, as well as the offending partners. Collyer on Partn. B. 3, ch. 2, § 7, p. 245, 246, 2d edit.; Fawcett v. Whitehouse, 1 Russ. & Mylne, 143.

[1] Ante, § 172; Blair v. Agar, 2 Sim. R. 289; 1 Story, Eq. Jurisp. § 220.

[2] But not Courts of Law. Capen v. Barrows, 1 Gray, 382.

[3] Caldwell v. Lieber, 7 Paige, R. 483.

[4] Bury v. Allen, 2 Collyer, R. 604.

[5] Stoughton v. Lynch, 1 Johns. Ch. R. 467; s. c. 2 Johns. Ch. R. 210; Brown v. Litton, 1 P. Will. 140; Crawshay v. Collins, 15 Ves. 218; Somerville v. Mackay, 16 Ves. R. 382, 387, 389; 1 Story, Eq. Jurisp. § 667; Story on Agency, § 207.

incurred by him thereby, they must be borne exclusively by himself.

[§ 233 *a*. The Statute of Limitations strictly bars only legal remedies; but Courts of Equity, by their own rules, independently of any statute, give great effect to length of time, and refer frequently to the Statute of Limitation as furnishing a convenient measure for an equitable bar.[1] In analogy to the statute, they have adopted in many cases the limit of six years.[2] Though in cases of direct trust, no length of time bars the claim between the trustee and *cestui que trust;* yet where there is a trust by implication, it must be pursued within a reasonable time.[3] And there is high authority for a proposition that a Court of Equity will not, after six years' acquiescence, unexplained by circumstances, nor countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner.[4] The cases, arising under the exception of Merchants' Accounts, in the Statute of Limitation, have been supposed to afford an analogy on questions between partner and partner.[5] But it is doubtful whether this

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[1] Beckford *v.* Wade, 17 Ves. R. 96; Collyer on Partn. B. 2, ch. 3, § 374, p. 339 (Perkins's edit.).

[2] Sterndale *v.* Hankinson, 1 Sim. R. 398; Acherley *v.* Roe, 5 Ves. R. 565, note *b*, and cases cited (Sumner's edit.).

[3] Ex parte Hasell, 3 Younge & Coll. R. 617; Edwards *v.* University, 1 Dev. & Batt. Eq. R. 325. See Townshend *v.* Townshend, 1 Bro. C. C. 554 (Perkins's edit.), and notes; Beckford *v.* Wade, 17 Ves. R. 87, and note (Sumner's edit.).

[4] Tatan *v.* Williams, 3 Hare, R. 358; Barber *v.* Barber, 18 Ves. R. 286; Ault *v.* Goodrich, 4 Russell, R. 430; Bridges *v.* Mitchell, Gilb. Eq. R. 224; Martin *v.* Heathcote, 2 Eden, R. 169. But see Robinson *v.* Robinson, 8 Bligh (N. S.), 352; S. C. 3 Clark & Fin. 717.

[5] Tatam *v.* Williams, 3 Hare, R. 347.

exception applies at law, where all dealings have ceased more than six years.[1]]

[1] Inglis *v.* Haigh, 8 Mees. & Welsb. R. 769; Cottam *v.* Partridge, 4 Manning & Granger, R. 271; Spring *v.* Gray, 5 Mason, R. 505; Coster *v.* Murray, 5 Johns. Ch. R. 522; Bass *v.* Bass, 6 Pick. R. 344; S. C. 8 Pick. R. 187; Union Bank *v.* Knapp, 3 Pick. R. 96; Collyer on Partn. B. 2, ch. 3, § 376, note (Perkins's edit.).

CHAPTER XII.

REMEDIES BY PARTNERS AGAINST THIRD PERSONS.

§ 234. We come, in the next place, to the remedies which belong to partners in their collective capacity, against third persons; and this will detain us but for a very short time. And here, it may be laid down as a general rule, that, at law, partners in their collective capacity are entitled to the same remedies, to be administered in the same way, as individuals have for the assertion of their rights, and the redress of their wrongs.[1] There are, however, some few exceptions, one of which is a remarkable exception, and is purely technical, and stands upon grounds peculiar to the common law. It is, where the suit is between the firm and one of its partners, or between one firm and another firm, in each of which one and the same person is a partner. In cases of this sort the common law requires, that all the persons jointly interested in the contract, or the wrong, should be made parties; and it is treated as an unjustifiable anomaly, if not as an absurdity, that one and the same person should, in the same suit, at once sustain the twofold character of plaintiff and of defendant, to enforce a right or redress a wrong, arising either from the contract, or act, or misconduct of those, with whom he is jointly con-

[1] Gów on Partn. ch. 3, § 1, p. 117, 118, 3d edit.; Collyer on Partn. B. 2, ch. 3, § 2, p. 177, 188 to 193, 2d edit.; Id. B. 3, ch. 5, p. 457.

cerned, or jointly interested.[1] It will make no difference, in cases of this sort, whether the suit is brought in the lifetime of all the partners, or after the death of one of them; because, in contemplation of law, no valid legal contract ever existed between the partners; and therefore the death of any one of them cannot make the contract available at law.[2]

§ 235. We have had already occasion to take notice, that this exception is peculiar to Courts of Common Law, and has no recognition whatsoever in Courts of Equity.[3] In the latter Courts, indeed, all the parties in interest must join, and be joined in the suit; but it is sufficient that all of them are on one side or the other side of the record; and they need not be all plaintiffs or all defendants in the same suit, even where the controversy is between two firms, in each of which some of them are partners.[4] We have also had occasion to see, that no such objection was recognized in the Roman jurisprudence; and that it is unknown to the jurisprudence of Scotland and of France, and probably also of most, if not of all, of the commercial nations of continental Europe.[5]

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[1] Gow on Partn. ch. 3, § 1, p. 118, 119, 3d edit.; Ante, § 221; Collyer on Partn. B. 2, ch. 3, § 2, p. 177, 188 to 193, 2d edit.; Id. B. 3, ch. 5, p. 457; Jones *v.* Yates, 9 Barn. & Cresw. 582; Bosanquet *v.* Wray, 6 Taunt. R. 598; Moffat *v.* Van Millingen, 2 Bos. & Pull. 112; De Tastet *v.* Shaw, 1 Barn. & Adol. 664; Teague *v.* Hubbard, 8 Barn. & Cresw. 345; Harvey *v.* Kay, 9 Barn. & Cresw. 356; Neal *v.* Turton, 4 Bing. R. 149; Denny *v.* Metcalf, 28 Maine, R. 389; Green *v.* Chapman, 26 Verm. 236.

[2] Gow on Partn. ch. 3, § 1, p. 119, 120, 3d edit.; Bosanquet *v.* Wray, 6 Taunt. R. 597. See Bailey *v.* Bancker, 3 Hill, R. 183.

[3] Ante, § 221, note; § 222.

[4] Ante, § 221 and note; § 222; 1 Story, Eq. Jurisp. § 666 to 674.

[5] Dig. Lib, 17, tit. 2, l. 65, § 15; Id. l. 52; Pothier, Pand. Lib. 17, tit. 2, n. 33; 2 Bell, Comm. B. 7, p. 619, 620, 5th edit.; Pothier, de Societé, n. 135, 136. — Mr. Bell, in the passage already cited (Ante, § 221, note (1),

§ 236. Analogous in principle to the case already stated at the common law, is that of one firm, partly composed of a common partner in another firm, which seeks by a suit to enforce a security against a stranger, after satisfaction of that security has been obtained from the latter firm. In such a case, the money received by the one firm being paid, and accepted in satisfaction of the security, the common partner in each firm will not be permitted to contravene the receipt thereof for that purpose, nor will he be allowed to sue upon such security, as one of the firm, although he is personally ignorant of the circumstances which constitute the satisfaction.[1] This turns upon the general principle, that the receipt of a partnership debt by one partner is a full discharge thereof against the firm; for each partner is, *sui juris*, competent to receive it on behalf of all, and duly to release and discharge the debtor.[2] And when once payment or satisfaction has been made to one partner, it can be of no consequence that he is connected with another firm; for this does not enable him to contravene his own act; and if he has no personal knowledge thereof, the receipt by his partners is treated, in construction of law, as his own receipt, and his assent is bound up in theirs.[3] There-

2 Bell, Comm. 620, 5th edit.), says: "In Scotland, debts between companies, in which the same individual is a partner, are every day sustained, as quite unexceptionable." It is to be lamented that the like rule has not been incorporated into the common law, treating the firm, for the purposes of the suit, as an artificial body, or quasi corporation. It would be highly convenient, and certainly conformable to the common sense of the commercial world.

[1] Gow on Partn. ch. 3, § 1, p. 120, 121, 3d edit. See Bailey *v.* Bancker, 3 Hill, R. 153.

[2] Ante, § 114, 120, 131.

[3] Jacaud *v.* French, 12 East, R. 317.

fore, where A. was a partnér with B., in one mercantile house, and with C. in another, and, after the former house had indorsed a bill of exchange to the latter, B., acting for the firm of A. and B., received securities to a large amount from the drawer of the bill, upon an agreement by B., that the bill should be taken up and liquidated by B.'s house; and, if not paid by the acceptors when due, it should be returned to the drawer; the Court of King's Bench held, that the deposited securities being paid, and the money, therefore, being received by B. in satisfaction of the bill, A. was bound by this act of his partner B., in all respects; and, therefore, he could not, in conjunction with C., his partner in the other house, maintain an action, as indorsees and holders of the bill, against the acceptors, after such satisfaction received through the medium of, and by agreement with B., in discharge of the same.[1]

§ 237. Upon a similar ground, if a partnership become possessed of a negotiable security, which has been procured by one partner, upon the understanding, that he will punctually provide for the payment thereof at its maturity, the partnership cannot sue upon such security; because the same partner must be made one of the plaintiffs, and, as it is clear in such a case, that he could not maintain any suit in his own name thereon, the same objections will avail against him, as a coplaintiff. Thus, where one partner in a banking house drew a bill in his own name upon a third person, who accepted the same, upon the condition that the partner would provide funds for the payment thereof at its maturity; and the bill was afterwards indorsed to the

[1] Jacaud v. French, 12 East, R. 317.

partnership, and a suit was thereupon brought by all the partners against the acceptor; it was held, that the action was not maintainable; because all the partners were bound by the acts of that partner, and as between him and the acceptor, there was no pretence of any right to recover.[1] So, also, a partner holding a security of the firm, by indorsement from the payee or other indorser, cannot sue the indorser thereon.[2]

§ 238. The same principle will apply to a case where all the partners sue upon an acceptance, or other security, procured fraudulently by one partner, without any participation or knowledge of the fraud by the other partners; for he must still be made a party plaintiff in the suit; and his fraud not only binds himself, but his innocent partners in that suit; for, unless all the plaintiffs are entitled to recover, the suit must fail.[3] The case may even be put still more strongly; for if the security be a fraudulent contrivance between the guilty partner and the third person, in fraud of the partnership, there can be no suit against such third person at law, founded thereon, since the guilty partner is at law a necessary plaintiff in every such suit.[4]

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[1] Sparrow *v.* Chisman, 9 Barn. & Cresw. 241.

[2] Bailey *v.* Bancker, 3 Hill, R. 188.

[3] Gow on Partn. ch. 3, § 1, p. 120, 3d edit.; Richmond *v.* Heapy, 1 Stark. R. 202, 204; Johnson *v.* Peck, 3 Stark. R. 66.

[4] Jones *v.* Yates, 9 Barn. & Cresw. 532; Kelly *v.* Wilson, Ryan & Mood. 178; Fellows *v.* Wyman, 33 N. H. R. 358; Homer *v.* Wood, 11 Cush. 62, in which the subject is very clearly presented by Bigelow, J. Lord Tenterden, in delivering the judgment of the Court, in the case of Jones *v.* Yates, went fully into the reasoning, on which this doctrine of the common law is founded; and, therefore, although somewhat long, the passage is here inserted: "These were two actions brought by the plaintiffs, as assignees of Sykes & Bury. The first was an action of trover to recover the value of three bills of exchange, which belonged to Sykes & Bury, and which Sykes had indorsed to the defendants, with whom he had been in part-

§ 239. Another exception may arise from the incompetency of one of the partners to maintain the suit,

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nership, in part payment of a demand, due from him to the partnership of Sykes, Yates & Young, and by him again immediately indorsed in the name of that partnership to Alzedo, who was a creditor of the firm. The second action was to recover money, drawn by Sykes from the funds of himself and Bury, and paid into the hands of Yates, in further discharge of the balance before mentioned, without the knowledge of Bury. Both the transactions were frauds by Sykes, on his partner Bury, and it must be taken, that Yates (at least when the bills were indorsed and the money paid) knew the bills and money came from the funds of Sykes & Bury, without the knowledge of Bury. It may be doubtful, whether Young was actually privy to either transaction; but in our view of the case, that point is not material. On behalf of the defendant it was contended, that Sykes & Bury could not (if they had continued solvent) have maintained any action against Yates & Young, in respect of either of these transactions; and that, if that were so, the plaintiffs, their assignees, could not sue, they having no better remedy at law than Sykes & Bury would have had. And we are of this opinion. It is unnecessary, therefore, to advert to any of the other points, raised in argument at the bar. We are not aware of any instance, in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground, that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor. So that, in this case (if it be held that Sykes & Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act, by alleging his own misconduct. The defrauded partner may perhaps have a remedy in equity, by a suit in his own name against his partner, and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct. There is a great difference between this case and that of an action brought against two or more partners on a bill of exchange, fraudulently made or accepted by one partner in the name of the others, and delivered by such partner to a plaintiff in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say in a court of law, that although the partner may for many purposes bind him, yet, that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. The party to a fraud, he, who profits by it, shall not be allowed to create an obligation in another by his own

from his or her own peculiar national or other character; for in all cases of suits brought by partners, all of the firm must be competent to sue. Thus, for example, it has been said by a learned writer, that, although the husband and wife are partners in a foreign country, by whose laws they are competent to carry on partnership business with each other; yet that they are incompetent to sue in an English Court of justice, as partners; since the law of England does not recognize their capacity so to engage in trade, and enter into

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misconduct, and make that misconduct the foundation of an action at law. Then, if Sykes & Bury could not sue, how could the plaintiffs, who represent them here? It was said, in support of the argument, that the property did not pass from Sykes by his wrongful act, but remained in Sykes & Bury. This was ingeniously and plausibly put; but as against Sykes the property did pass at law, and there was no remedy at law for Bury to recover it back again. He could not do so without making Sykes a party. Further, the right of the assignees to sue in this case was said to be analogous to the right of assignees to sue for, and recover back, property voluntarily given by a bankrupt to a particular creditor, in contemplation of his bankruptcy, in favor of such creditor, and in preference to him, in which case the bankrupt could not have sued, if no commission had issued, yet the assignees are allowed to do so. That is a case, where the representatives could, where the party represented could not, sue, and it is the only instance of the kind mentioned at the bar, that has occurred to us. But, if we attend to the principle on which the assignees are allowed to sue, we shall find there is no analogy between that case and the case before the Court; for the principle, on which assignees have been held entitled to recover in such cases, is not on the ground of fraud on any particular person, but on the ground that there has been fraud on the bankrupt laws, which are made for the purpose of effecting an equal distribution of the insolvent's estate among all the creditors, and which purpose would be defeated, if a party on the eve of a bankruptcy, and with a view to it, could distribute his effects according to his own pleasure among some favorite creditors, to the total exclusion of the others. This is mentioned by Lord Mansfield, as the principle of the decisions in the early cases on this subject; Alderson *v.* Temple, 4 Burrow, 2235; Harman *v.* Fisher, Id. 2237; s. c. Cowper, R. 117. For these reasons, we think the plaintiffs are not entitled to recover." But see Longman *v.* Pole, 1 Mood. & Walk. 223. Is this latter case distinguishable upon the ground that it was case for a tort?

a commercial partnership.[1] The doctrine here laid down is certainly not maintainable, as a doctrine of public law; and the authority cited to support it by no means bears it out in its full latitude.[2]

§ 240. A case far more unexceptionable, to illustrate the principle of this exception, is that of a partnership in a belligerent, or in a neutral country, where the suit is brought, which is composed in part of one or more partners domiciled in an enemy's country; for, under such circumstances, during the war, no suit can be brought there to enforce any contract whatever in favor of the partnership. A state of war suspends all commercial intercourse between the belligerents, and shuts their Courts against all suits and proceedings, and all claims of persons, who have acquired and retain a hostile character.[3]

§ 241. Subject, however, to exceptions of this or a similar nature, which all stand upon peculiar grounds, the general rule is, as has been already mentioned, that partners, in their collective or social capacity, may bring any suits which it would be competent for any individual to bring. It is also a general rule, that in all such suits at law all the partners should join.[4] The

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[1] Collyer on Partn. B. 3, ch. 5, p. 459, 2d edit., citing Cosio v. De Bernales, Ryan & Mood. R. 102. It is also reported in Carr. & Payne, R. 266.

[2] All that Lord Tenterden decided in the case, was, that he would not presume that a feme covert in a foreign country could engage in a partnership with her husband, without some proof that such was the law of the foreign country; and no such proof being given, the plaintiffs were nonsuited. There seems nothing objectionable or inconvenient in this doctrine.

[3] Gow on Partn. ch. 3, § 1, p. 120; McConnell v. Hector, 3 Bos. & Pull. 113; Griswold v. Waddington, 16 Johns. R. 438; The Julia, 8 Cranch, 181; Albrecht v. Sussman, 2 Ves. & Beam. 323.

[4] Gow on Partn. ch. 3, § 1, p. 127, 128, 3d edit.; Gage v. Rollins, 10 Pick. R. 348.

rule, however, undergoes, or may undergo, an exception in cases of dormant partners; for it is at the option of the plaintiffs in such cases, either to join the dormant partner in the suit, or to omit him (as in the corresponding case of the partners' being sued as defendants, it is at the option of the plaintiff to join the dormant partner or not), and the joinder or non-joinder will not constitute any objection to the maintenance of the suit in any manner whatsoever.[1] The same exception applies *à fortiori*, where a man is merely a nominal partner; for, as he has no real interest, there seems no necessity of his joining, as a party, in any partnership suit,[2] although there is no doubt that he may so join.[3]

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[1] Gow on Partn. ch. 3, § 1, p. 128, 3d edit.; Skinner *v.* Stocks, 4 Barn. & Ald. 437; Lloyd *v.* Archbowle, 2 Taunt. R. 324; Brassington *v.* Ault, 2 Bing. R. 177; Wilson *v.* Wallace, 8 Serg. & Rawle, 55; Clarkson *v.* Carter, 3 Cowen, R. 85; Lord *v.* Baldwin, 6 Pick. R. 348, 352; Leveck *v.* Shaftoe, 2 Esp. R. 468; Ross *v.* Decy, 2 Esp. R. 470, note; Collyer on Partn. B. 3, ch. 5, § 1, p. 465; Id. p. 468 to 470, 2d edit.; Mawman *v.* Gillett, 2 Taunt. R. 325, note; Alexander *v.* Barker, 2 Cromp. & Jerv. 133; Wood *v.* O'-Kelley, 8 Cush. 406; Jackson *v.* Alexander, 8 Texas, 109; Page *v.* Brant, 18 Ill. 38; Cothay *v.* Fennell, 10 Barn. & Cresw. 671. — The authorities here cited are not all exactly agreed upon this point, where the dormant partner is a party plaintiff; but they all agree as to the point where such a partner is a party defendant. [And in Secor *v.* Keller, 4 Duer, 416, it was held that a dormant partner must join with his active partner as plaintiffs in a suit by them for work and labor done for the firm.] It seems exceedingly difficult to state any reasonable distinction between the cases; and the text contains what seems to me the true doctrine, founded upon the weight of authority.

[2] Collyer on Partn. B. 3, ch. 5, § 1, p. 470, 2d edit.; Gow on Partn. ch. 3, § 1, p. 128, 129, 3d edit.; Parsons *v.* Crosby, 5 Esp. R. 109; Davenport *v.* Rackstraw, 1 Carr. & Payne, R. 89; Glossop *v.* Coleman, 1 Stark. R. 23; Teed *v.* Elworthy, 14 East, R. 210; Kell *v.* Nainby, 10 Barn. & Cresw. 20. But see Guidon *v.* Robson, 2 Camp. 302; Kieran *v.* Sanders, 6 Adol. & Ell. 515.

[3] Guidon *v.* Robson, 2 Camp. R. 302.

§ 242. In this respect, perhaps, there may be ground for a distinction between the cases of common unwritten contracts, and cases where a written instrument is made payable to certain persons by name, although one of them is but a nominal partner. For it may well be said, that, in the latter case, as the promise is made to all, the suit thereon may, and should be brought in the name of all, as proper parties to the contract.[1] There can be no doubt, that, in a case of this sort, all the persons named may join in the suit;[2] but it is quite a different question, whether all must so join, when all have not an interest in the contract.[3] We all know, that there are many cases of written contracts, as for example, of policies of insurance, procured to be underwritten by agents or brokers in their own names, in which, nevertheless, the suit for a breach thereof may be brought either in the name of the principal, or of the agents or brokers.[4] Why the same rule might not well apply in other analogous cases of written contracts, it is not easy to say.[5] It is proper, however, to add, that there is some apparent conflict in the authorities on this point.[6]

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[1] Collyer on Partn. B. 3, ch. 5, § 1, p. 465, 470, 2d edit.

[2] Kill v. Nainby, 10 Barn. & Cresw. 20.

[3] Gow on Partn. ch. 3, § 1, p. 122, 123, 3d edit.

[4] Story on Agency, § 160 to 162.

[5] Collyer on Partn. B. 3, ch. 5, § 1, p. 465 to 468, 2d edit.; Grove v. Dubois, 1 Term R. 112; Cumming v. Forrester, 1 Maule & Selw. 497; Hagedorn v. Oliverson, 2 Maule & Selw. 426; Garrett v. Handley, 4 Barn. & Cresw. 664; Lucena v. Crawford, 3 Bos. & Pull. 98; Gow on Partn. ch. 3, § 1, p. 122, 123, 3d edit.; Bell v. Ansley, 16 East, R. 141; Skinner v. Stocks, 4 Barn. & Ald. 437; Alexander v. Barker, 2 Cromp. & Jerv. 133, 138; Atkinson v. Laing, 1 Dowl. & Ryl. N. P. C. 16.

[6] Guidon v. Robson, 2 Camp. R. 302. — On this occasion, the case being an action by Guidon alone against Robson, upon a bill of exchange, drawn in the name of Guidon & Hughes (the latter being a mere clerk

§ 243. And this naturally conducts us to the more enlarged consideration, in what cases, and under what circumstances contracts are to be treated as partnership contracts, of which the firm may avail itself by way of suit. We have already seen,[1] that in order to bind the partnership in any contract with third persons, it is ordinarily necessary that it should be made in the firm name; and that, if made by one partner in his own name only, it will ordinarily be binding only upon himself, and not upon the partnership.[2] There are, however, exceptions to this rule, where the contract is

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of Guidon) on Robson, and accepted by him, Lord Ellenborough said: "There being such a person as Hughes, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner, as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm for the purpose of gaining credit. But, where the name of a real person is inserted with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person. The variance is fatal." But see Kill v. Nainby, 10 Barn. & Cresw. 20; Hall v. Smith, 1 Barn. & Cresw. 407; Marchington v. Vernon, 1 Bos. & Pull. 101, note; Marsh v. Robinson, 4 Esp. R. 98; Walton v. Dodson, 3 Carr. & Payne, 162; Skinner v. Stocks, 4 Barn. & Ald. 437; Cothay v. Fennell, 10 Barn. & Cresw. 671. In Alexander v. Barker, 2 Cromp. & Jerv. 133, 138, Mr. Justice Bayley said: "I am the less surprised, that the learned Judge should have considered D. Alexander as the person with whom the defendant contracted, and who alone could maintain the action, because I remember that it was at one period the impression of Lord Ellenborough, that where money was lent by a partner, the action must, in all cases, be brought by the individual with whom the contract was made. But he was afterwards convinced of what is doubtless the true rule, viz. that, where a contract is made by one on behalf of others, the action may be brought in the name of the principals."

[1] Ante, § 102, 136, 142.

[2] Ante, § 102, 136, 142; Faith v. Raymond, 11 Adol. & Ellis, 339.

made by one partner in his own name, for and on behalf of the partnership, or for the benefit thereof, and yet the firm will be bound thereby.[1] There is a like enlargement of obligation in many other cases of written and unwritten contracts, where the same doctrine will reciprocally apply in favor of the partnership, as in the converse case is applied against it. Thus, for example, if a contract of guaranty should be entered into apparently with one partner, but in reality it should be intended to be for the indemnity of the firm for advances to be made by the firm; an action might be maintained by all the partners, as upon a joint contract therewith, although the written papers, containing the guaranty, should be addressed to one partner, and he alone should conduct the negotiation.[2] The same

[1] Ante, § 102, and note (1), § 142; Burnley v. Rice, 18 Texas, 497.

[2] Gow on Partn. ch. 3, § 1, p. 121 to 123, 3d edit.; Collyer on Partn. B. 3, ch. 4, § 1, p. 446, 447, 2d edit.; Id. ch. 5, § 1, p. 464, 465; Garrett v. Handley, 3 Barn. & Cresw. 463; s. c. 4 Barn. & Cresw. 664; Walton v. Dodson, 3 Carr. & Payne, R. 162.—Mr. Gow has summoned up the authorities on this point as follows. "Partners sometimes seek to enforce a guarantee, given to secure the repayment of an advance to be made by the firm. In such a case the action must necessarily be brought by all the partners to whom the guarantee is given, and by whom the advance is made. And where a contract of that description is apparently entered into in favor of one partner only, yet in fact if it be intended as an indemnity to the firm, in respect of an advance to be made by them, a joint action may be maintained. Thus, in the late case of Garrett and another v. Handley (4 B. & C. 664), which was an action on a guarantee by two, as the survivors of a firm of three partners, it appeared that the guarantee was addressed to one of the partners only; but evidence was produced, which established that the advance to secure which the guarantee was entered into, was made by the firm, and that the guarantee was given for their joint benefit, and not to indemnify the single partner only. It was objected at nisi prius, and afterwards insisted upon on a motion to enter a nonsuit, that there was a misjoinder; for, as the guarantee was in terms given to one partner, to whom alone the promise could be construed to have been made, the action should have been brought by him only. But the Court of King's Bench held, that as the

rule would apply to a loan, made by one partner in a banking establishment, out of the banking fund, although the whole negotiation should be conducted by and in the name of that partner only.[1]

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guarantee was proved to have been intended for the benefit of the firm, the action was properly brought by the surviving partners; and, under such circumstances, is not competent to the partner, to whom the guarantee may have been addressed, to treat the advance as one made by himself, on his individual account, and in that character to support a separate action. This was determined in a previous action on the same guarantee, and in which the plaintiff declared, that, in consideration that he would advance a sum of money to A. B., the defendant promised that provision should be made for paying the plaintiff. At the trial it appeared, that the defendant had given to the plaintiff the guarantee stated in the declaration, and that the latter was a partner with two other persons in a banking-house, and that the firm had advanced the money, and charged A. B. in account with the same; and it was held, that the averment in the declaration, that the plaintiff had advanced the money, was not sustained by the proof, there being no evidence to show that the money had been advanced to the plaintiff by the firm, and by him to A. B. It is not to be collected from either of the two preceding cases, nor was it in fact necessary to determine, whether the partner to whom the guarantee was actually given, could have maintained a separate action upon it, provided his declaration so truly and correctly stated the facts, as not to have been open to the objection of a variance between the allegation and the proof. But judging from analogy to the rule, applicable to a policy of insurance, which allows the action to be brought, either by the party for whose benefit it was effected, or in the name of him who effected it, it would seem, that that partner, as being the party with whom the contract was made, might have supported such an action." Gow on Partn. ch. 3, § 1, p. 121, 122, 123.

[1] Alexander v. Barker, 2 Cromp. & Jerv. 133, 138. See Robson v. Drummond, 2 Barn. & Adol. 83. — On this occasion, Mr. Justice Bayley said: "I have no doubt in this case, but that this action is maintainable by the plaintiffs; and in that opinion I am fortified by the case of Garrett v. Handley. Here, D. Alexander stood in the double capacity of an individual and a member of the firm. Barker wanted an advance of money, and to him it was quite immaterial by whom the advance was made, whether by D. Alexander alone, or by the house of which he was a member. He applies to D. Alexander to make the advance. He does not qualify that application, and say, you may be a member of a firm, and I will deal with you only, and will not be answerable to other persons; but he makes his application without any qualification. By thus applying generally, he entitles D. Alexander, if

§ 244. In the course of partnerships it not infrequently happens, that new partners are admitted, or old partners retire, without any change of the firm name; and upon such a change the contracts and effects and securities of the existing partnership are agreed to remain, and become a part of the funds of the new firm. But in all such cases the contracts and securities must be sued for in the names of the original firm, unless, indeed, they are negotiable securities, and are indorsed over by the old firm to the new firm; in which latter case the new firm may sue thereon in their own names, like any other holders; for in all other cases no persons are permitted to sue thereupon at law, except the partners, who originally made the contract, or had an interest therein.[1] *A fortiori*, the same rule will be applied

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he makes the advance, to place him in the situation of being answerable to him in either of his capacities, according to that in which he makes the advance. From the testimony it appears, that the advance was made by D. Alexander, not individually, but with the money of the firm. He accepted, therefore, the application for the advance, not as an individual, but in his capacity as a member of the firm. In Garrett *v.* Handley, the contracting partner first brought the action in his own name; but it appeared that the advance was made by the house, and the Court said, you did not make the advance, and cannot maintain the action. Another action was then brought in the name of the firm, and the Court being of opinion that the guarantee was intended to apply to advances made by the firm, thought that the action was maintainable. The language of that guarantee was much more pointed than this letter. It was addressed to an individual, and was to this effect: — 'I understand from Mr. G., that you have had the goodness to advance £550, &c., upon my assurance, which I hereby give, that provision shall be made for repaying you this sum, &c.' But the advance was not made by the individual alone; and it was holden, that the firm by whom the advance was made ought to sue. It appears to me, therefore, that the plaintiffs were the persons who might and ought to sue in this case." See also Cothay *v.* Fennell, 10 Barn. & Cresw. 671; Collyer on Partn. B. 3, ch. 4, § 1, p. 446, 447, 448, 2d edit.; Id. ch. 5, § 1, p. 465.

[1] Collyer on Partn. B. 3, ch. 5, § 1, p. 461, 462, 463, 465, 466, 2d edit.; Osborne *v.* Harper, 5 East, R. 225; Wilsford *v.* Wood, 1 Esp. R. 182; Pease

with more strictness, in cases where the contract is under seal; for, then, ordinarily, the parties to the deed, and none others, can sue, or be sued thereon.[1] In equity, the case may be far otherwise; for assignees of equities and equitable interests are competent to sue in equity in their own names, to enforce payment of the assigned debts, or other choses in action, although they may not be competent at law.[2]

§ 245. Questions, also, of a very delicate nature may arise out of contracts and obligations by third persons, with a partnership, where the contracts or obligations are of a continuing nature, as to what is their true extent and operation, when there has been any change of the partners by the retirement of an old partner, or the admission of a new one. Thus, for example, a guaranty for advances to be made, or credits to be given, from time to time, by a firm to a third person; and some new advances or credits may have occurred, after a change of the original partners, in the manner above suggested. Under such circumstances, the question would arise, whether the guarantor would be liable,

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v. Hirst, 10 Barn. & Cresw. 122, 127; Innes *v.* Dunlop, 8 Term R. 595; Ord *v.* Portal, 3 Camp. R. 239; Robson *v.* Drummond, 2 Barn. & Adol. 301; Radenhurst *v.* Bates, 3 Bing. R. 470.

[1] Collyer on Partn. B. 3, ch. 5, § 1, p. 463, 464, 2d edit.; Metcalf *v.* Rycroft, 6 M. & Selw. 75. See also Pease *v.* Hirst, 10 Barn. & Cresw. 122, 127.

[2] 2 Story on Eq. Juris. § 1039, 1040; Tierman *v.* Jacobs, 5 Peters, R. 597, 598. — If, after an assignment, the debtor should promise the assignees to pay them, a suit might then and upon that promise be maintained by the assignees against the debtor in a Court of Law. Collyer on Partn. B. 3, ch. 5, § 1, p. 462, 463, 2d edit.; Wilsford *v.* Wood, 1 Esp. R. 182; Moor *v.* Hill, 2 Peake, R. 11; Innes *v.* Dunlop, 8 Term R. 595. There may be cases, also, where, after the contract is made with partners, a severance may be made by the consent of all the parties in interest, and then each may sue for his own share. See Collyer on Partn. B. 3, ch. 5, § 1, p. 467, 468, 2d edit.

either to the old firm, or to the new firm, for any such advances or credits, after any such change. It has been held, that the guarantor would not be liable therefor; and that no such guaranty ought to be extended beyond the actual import of its terms; but that it ought to be limited to advances and credits made by the original firm only.[1]

§ 246. The same doctrine will apply to more formal instruments, such as a bond given by a principal and surety to a firm, to secure advances made by the firm to the principal; for, upon such a bond the surety will not be liable for any advances made after the withdrawal or death of one of the partners.[2] Nor, is there,

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[1] Collyer on Partn. B. 3, ch. 4, § 1, p. 443, 444, 2d edit.; Myers v. Edge, 7 Term R. 250, 252; Cremer v. Higginson, 1 Mason, R. 323; Gow on Partn. ch. 3, § 1, p. 123, 124, 3d edit.; Spiers v. Houston, 4 Bligh, N. S. R. 515; Ex parte Kensington, 2 Ves. & Beam. 79; Dry v. Davy, 10 Adol. & Ellis, 30; s. c. 3 Perr. & Dav. 249.

[2] Strange v. Lee, 3 East, R. 489; Pemberton v. Oakes, 4 Russ. R. 154, 167; Weston v. Barton, 4 Taunt. R. 673, 682.—In this last case, Sir James Mansfield, in delivering the opinion of the Court, said: "It is not necessary now to enter into the reasons of those decisions; but there may be very good reasons for such a construction. It is very probable, that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons, possessing these qualities in a greater degree than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied. It would, therefore, be very unreasonable to hold the surety to his contract, after such change. And though the sum here is limited, that circumstance does not alter the case; for although the amount of the indemnity is not indefinite, yet £3000 is a large sum; and even if it were only £1000, the same ground in a degree holds; for there may be a great deal of difference in the measure of caution or discretion, with which different persons would advance even a thousand pounds. Some would permit one who was almost a beggar, to extend his credit to that sum; others would exercise a due degree of caution for the safety of the surety. And, therefore, we are of opinion, that as to such sums only, which were advanced before the decease of Golding, can an

in this respect, any real difference between the decisions of Courts of Law, and those of Courts of Equity, as to the construction or extent of the terms of the instrument. In each Court, the interpretation, put upon the terms of the contract, has precisely the same extent, and the same limitations.[1]

§ 247. These decisions may, at first view, be deemed somewhat rigid, if not inequitable. But, in reality, they stand upon grounds capable of an entirely satisfactory and solid vindication. In the first place, it can never be said with truth or justice, that a guaranty or suretyship for advances, to be made by A., B., & C., does properly extend to any advances made by A. & B., or by A., B., & D.; and therefore the guarantor, or surety, may, with all good faith and correctness, say, *Non in hæc fœdera veni.* Besides, as has been well observed, the guarantor or surety may have very good reasons, why he might be willing to enter into an engagement with a fixed reliance upon the vigilance, fidelity, discretion, and skill of a particular partner, when he would not, if that partner were to withdraw, be willing to enter into, or to prolong any such engagement.[2]

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indemnity be recovered by the plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant."

[1] Pemberton *v.* Oakes, 4 Russ. R. 154.

[2] Weston *v.* Barton, 4 Taunt. R. 673, 682; Simson *v.* Cooke, 11 Bing. R. 461. See also Russell *v.* Perkins, 1 Mason, Cir. R. 368; Strange *v.* Lee, 3 East, R. 484, 490. — Lord Ellenborough, in delivering the opinion of the Court in this last case, said: "The Court will, no doubt, construe the words of the obligation according to the intent of the parties to be collected from them; but the question is, what that intent was. The defendants' obligation is to pay all sums due to them, on account of their advances to Blyth.' Now who are 'them,' but the persons before named, amongst whom is James Walwyn, who then constituted the banking house, and with whom the defendant contracted? The words will admit of no other meaning. And, indeed, with respect to any intent which parties entering into contracts of

§ 248. It has been said, that guaranties for the payment of the debts of third persons are not general instruments under seal, and that there is no technical rule, which, as to them, prevents a Court of Law from looking at the real justice and merits of the case.[1] This is true. But it is equally true, that the language in every case is to be construed according to its fair and reasonable meaning, and is not to be strained to reach cases unforeseen or unprovided for; for that would be to make, and not merely to construe, contracts. And, indeed, in all cases of this sort, the guarantor or surety has a right to insist, that he shall not be presumed to enter into engagements for events, which were never so submitted to his consideration or contemplation, and which, if considered or contemplated, might have induced him altogether to abstain from any engagement whatsoever.

§ 249. The same reasoning is equally applicable to another class of cases, where there is a continuing contract with a partnership, such as a contract to buy goods, or to hire them of the partnership from year to year, for a term of years; for such a contract could hardly

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this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house, at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters, therefore, of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement." See Dry v. Davy, 2 Perr. & Dav. 249; s. c. 19 Adol. & Ellis, 30.

[1] Collyer on Partn. B. 3, ch. 4, § 1, p. 445, 446, 2d edit.; and the observations of Mr. J. Park, in Hargrave v. Smee, 3 Moore & Payne, 584; s. c. 6 Bing. R. 244; and of Lord Tenterden, in 5 Barn. & Ald. 192; Pease v. Hirst, 10 Barn. & Cresw. 122; Dry v. Davy, 10 Adol. & Ellis, 30; s. c. 1 Perr. & Dav. 149.

be entered into without some reference to the character, skill, and honesty of the existing partners; and it is scarcely presumable, that any man would be willing to have his contract, or his patronage, assigned over from time to time to mere strangers, of whom he knew nothing, and of whose competence and ability and fidelity he might have no adequate means of inquiry.[1]

§ 250. But the most striking, as well as the most usual, illustration of this doctrine, which occurs in actual practice, is, where bonds are given by sureties to partners, for the fidelity and good conduct of clerks, and other officers and agents, in the service and employment of the partnership. In all cases of this sort, the uniform rule of construction of the bond is, unless some clear language to the contrary is inserted, that the bond does not apply as a security, after any change of the members of the partnership by death, or otherwise.[2] But language may be used in a bond, which shall clearly import a continuing liability, notwithstanding any change of the firm; and if it does, there can be no question, that it will, both at law and in equity, have the most complete operation.[3]

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[1] Robson *v.* Drummond, 2 Barn. & Adol. 303.— Quere, whether it would make any difference, that the retiring partner was a dormant partner; and that the ostensible partner still remained in the firm. See Dry *v.* Davy, 3 Perr. & Dav. 249; s. c. 10 Adol. & Ellis, 30; Robson *v.* Drummond, 2 Barn. & Adol. 301.

[2] Collyer on Partn. B. 3, ch. 4, § 1, p. 435 to 442, 2d edit.; Gow on Partn. ch. 3, § 1, p. 123 to 125, 3d edit.; Wright *v.* Russell, 3 Wils. R. 532; s. c. 2 W. Black. 934; Dance *v.* Girdler, 4 Bos. & Pull. R. 34; Strange *v.* Lee, 3 East, R. 434; Arlington *v.* Merrick, 2 Saund. R. 412; University of Cambridge *v.* Baldwin, 5 Mees & Welsb. 580; Simson *v.* Cooke, 1 Bing. R. 452, 461.

[3] Metcalf *v.* Bruin, 12 East, R. 400; Simson *v.* Ingham, 2 Barn. & Cresw. 65; Moller *v.* Lambert, 2 Camp. R. 548.—Barclay *v.* Lucas (1 Term R. 291) was a case, which was supposed to contain language, importing a pro-

§ 251. The like doctrine equally applies to cases, where a guaranty is given by a firm on behalf of one person, or by one person on behalf of a firm, and afterwards another person is introduced into the business of that person, or a material change takes place in the firm; for the guarantor or guarantors will not be liable thereon for any subsequent advances, made to such a person or firm, with a knowledge of the change.[1]

§ 252. Hitherto we have been speaking of the original rights of partners against third persons, arising under general contracts, or special engagements with them, and the proper limitations and qualifications thereof. But many circumstances may subsequently occur, which will suspend, or defeat, or extinguish or vary these rights, of some of which it seems proper to take notice, in this connection. In the first place, if one of the partners should take an acceptance, or other security for any debt, payable at a future day, this will be construed to be an agreement to give time to the debtor, so as to suspend the right of action of the firm for the original debt, until such security shall be dishonored or shall become due.[2] We have already had occasion to take notice of the case of a security given

vision of this character; but great doubts may well be entertained, whether the case can be maintained upon any such interpretation. See Collyer on Partn. B. 3, ch. 4, § 1, p. 436, 437, 441, 2d edit.; Barker v. Parker, 1 Term R. 287; Strange v. Lee, 3 East, R. 491; Gow on Partn. ch. 3, § 1, p. 124, 3d edit.; Simson v. Cooke, 1 Bing. R. 452.

[1] Gow on Partn. ch. 3, § 1, p. 123 to 125, 3d edit.; Collyer on Partn. B. 3, ch. 4, § 1, p. 438, 442, 443, 2d edit.; Wright v. Russell, 3 Wils. R. 530; s. c. 2 Wm. Black. 934; Bellairs v. Hobsworth, 3 Camp. R. 53; Ex parte Watson, 19 Ves. 459; Simson v. Cooke, 1 Bing. R. 452, 461; Ante, § 245 to 247.

[2] Collyer on Partn. B. 3, ch. 4, § 2, p. 453, 2d edit.; Tomlins v. Lawrence, 3 Moore & Payne, 555.

to one firm, of which satisfaction has been obtained by another firm, each firm having one and the same common partner, which will operate as an extinguishment of any further right of recovery upon such security.[1] *A fortiori*, a release of a debt by one partner at least, if it be not a fraud, will amount to an extinction of the debt against the partnership.[2]

§ 253. In the next place, subsequent dealings with a new firm will in many cases, diminish, or discharge, or satisfy a debt, due to the old firm by mere intendment and operation of law. Thus, for example, if one of several partners should die, or retire from the firm, and a balance should then be due to the firm, such balance will be gradually diminished, and may be extinguished, by sums subsequently paid to the remaining partners, unless such sums shall be otherwise specifically appropriated at the time of the payment.[3] It

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[1] Ante, § 236; Jacaud *v.* French, 12 East, R. 317.

[2] Collyer on Partn. B. 3, ch. 4, § 2, p. 453, 2d edit.; Id. B. 3, ch. 2, § 1, p. 311, 312; Id. ch. 5, § 5, p. 485; Watson on Partn. p. 225, 2d edit.; Perry *v.* Jackson, 4 Term R. 459; Hawkshaw *v.* Parkins, 2 Swanst. R. 544; Barker *v.* Richardson, 1 Younge & Jerv. 362, 365, 366; Gow on Partn. ch. 2, § 2, p. 60, 61; Ante, § 114.

[3] Allcot *v.* Strong, 9 Cush. 326; Farnum *v.* Boutelle, 13 Met. 159; Morgan *v.* Tarbell, 28 Verm. 502; Collyer on Partn. B. 3, ch. 4, § 1, p. 450 to 452, 2d edit.; Id. ch. 3, § 4, p. 422 to 424; Ex parte Kendall, 17 Ves. 514; Clayton's Case, in Devaynes *v.* Noble, 1 Meriv. R. 529, 572; Bodenham *v.* Purchas, 2 B. & Ald. 39. — In this last case, Mr. Justice Bayley said: "I cannot distinguish this in principle from Clayton's Case. The decisions in the courts of law do not break in upon the distinction there taken. The principle established by those decisions is this, that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases. But where the accounts are treated as one entire account by all parties, that rule does not apply. In this case the bond was given in 1801, for advances made or to be made in Havard's lifetime; at his death, the balance due was £4404. The surviving partners might

has been supposed, that the same doctrine will apply in the case of an account current between a new firm, composed of the remaining partners of the old firm, and a new partner;[1] but, perhaps this may, in the present state of the authorities, be thought to admit of doubt, unless the balance is, with the consent of all the parties in interest, carried to the debit of the new firm; for then the ordinary rule as to the appropriation of payments will apply.[2] But the mere fact, that a cred-

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then have called for payment of that sum, or they might have treated it as an insulated transaction, and kept that as a distinct and separate account. But instead of that, they blend it with the subsequent transactions; for in the first account delivered after Havard's death, are included several items, down to the 30th of June, and the payments after his death reduce the balance, at that time, to £1420. They might even then have treated this balance as a distinct account, and as money due on the bond, if they had so chosen. Do they do so? Look to the next account; the parties balance their accounts every three months; and in the next quarterly account, they bring forward the balance of £1420, and make it an item in one entire account, subsisting between these parties. The account goes on from 1810 till 1813; and the then balance is treated as one entire balance of one entire account, as the result of all the transactions between the parties in the intermediate time. The plaintiffs were not bound to have so treated it at Havard's death; but having done so, there is not any authority for saying, that they are now at liberty to apply the several payments in reduction of the debt incurred by the subsequent advances, to the exclusion of the bond debt. It certainly seems most consistent with reason, that where payments are made upon one entire account, that such payments should be considered as payments in discharge of the earlier items. Clayton's Case, where all the authorities were fully considered by the Master of the Rolls, is directly against the plaintiff's right to make any such appropriation as he desires. That case does not break in upon any of the cases at law, and ought to govern our decision in the present instance; and I am therefore of opinion, that there ought to be judgment for the defendant."

[1] Pemberton v. Oakes, 4 Russ. 154, 168.

[2] Gow on Partn. ch. 5, § 2, p. 244 to 246, 3d edit.; Clayton's Case, in Davaynes v. Noble, 1 Meriv. R. 604. See Copland v. Toulman, 1 West, R. (H. of Lords) p. 169; s. c. 7 Clark & Fin. 350. In Pemberton v.

itor of the firm, knowing of the death of one of the firm, continues to deal as before with the survivors for

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Oakes (4 Russ. R. 154, 168), Lord Lyndhurst said: "The third question is, Whether the balance due from Stokes to the bank at the time of Harding's death, has been discharged by his subsequent payments; and that point is decided by Clayton's Case, and Bodenham v. Purchas. It is true, that the facts here are not, in every respect, precisely the same with the circumstances of these two cases. But the decisions in them proceeded on a broad general principle, equally applicable to the state of circumstances existing here. Where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts; if he does not appropriate it, the creditor may make an appropriation; but if there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. Here it is not pretended, that any distinct appropriation of the payments was made by the parties. It was the practice of the bank to settle their accounts with Stokes quarterly; transferring, at the end of each quarter, the balance then due from him to the account of the next quarter. Harding died in the middle of a quarter; but, on that occasion, no change took place in the mode of settling the accounts. At the end of the then current quarter, the balance was struck exactly as if Harding had been alive, and no notice was taken of his death. There being no distinct appropriation of the payments, either by the one party or the other, the law makes the appropriation with reference to the order of the items of the account. If so, the debt which Stokes owed to the bank at the time of Harding's death, has been discharged by the subsequent payments. In Bodenham v. Purchas, a Court of Law confirmed the rule, which Sir William Grant had laid down in a Court of Equity. The point was again brought into discussion in Simson v. Ingham, 2 Barn. & Cresw. 65; and the principle was again confirmed, though the particular circumstances of the transaction produced a different decision. In that case, two accounts were formed by a London bank at the death of one of the partners in a country bank, which dealt with them — the one was styled the old account — the other, the new; and in the latter, the London bank entered all the payments, made to them by the country bank, after the death of that partner; so that a distinct appropriation was made. The same question arose in Brooke v. Enderby, before the Common Pleas; and there, too, the principle of Clayton's Case was adopted. Feeling myself bound by the force and authority of these decisions, and acquiescing completely in the reasoning of Sir William

any length of time, without requiring payment of the balance due to him from the firm at the time of the death, will not deprive such creditor of the remedy which he has in equity against the assets of the deceased partner for the debt; but there must be other concurring circumstances establishing an abandonment of his claim against the deceased, and adopting the responsibility of the survivors for the debt instead thereof.[1]

Grant, I must decide that there was no debt due to Oakes and Willington under the indenture of the 4th of January, 1802, at the time when the memorandum was indorsed on the bond." A somewhat different view seems to have been taken by Lord Abinger, in Jones v. Maund (3 Younge & Coll. 347).

[1] Winter v. Innes, 4 Mylne & Craig, 101, 108, 109. In this case Lord Cottenham said: "The question, therefore, is, Whether a creditor of a firm, who, knowing of the death of one of the firm, continues to deal, as before, with the survivor for any length of time, without requiring payment of the balance due to him from the firm at the time of the death, thereby loses the remedy which he had in equity against the estate of the deceased partner; — particularly in a case in which there is not only no evidence of any intention to abandon such claim, and to adopt the individual responsibility of the surviving partner in its stead, but the total absence of any object or consideration for so doing, and conclusive evidence that the principal object of the forbearance was not to press upon or prejudice the estate of the deceased, of whose will the creditor was himself a trustee and executor, though he did not prove. It would, I think, be extraordinary, if there were authorities to be found in support of the affirmative of this proposition. I will shortly refer to some of the principal cases at law and in equity which bear upon this subject. The cases at law have necessarily arisen where the dissolution of the partnership has taken place by arrangement between the partners, and not by death. It will be found that in some, even where it was clear that the creditor intended to take the separate security of the continuing partner in lieu of the joint liability of the dissolved firm, the retired partner was held not to be discharged, as in David v. Ellice, and Lodge v. Dicas, in which the creditor, with a knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt; but it was held that he had not thereby released the retiring partner, upon the ground of want of consideration for his so doing. These decisions have been considered as carrying the doctrine very far, and undoubtedly they do; and the true ground appears to me to have been acted upon in Bedford v. Deakin, and Thomp-

§ 254. Indeed, it may be laid down, as a general rule, that, when a debt is once contracted by a third person with a partnership (it not being by a negotiable secu-

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son *v.* Percival. In the former, it is laid down, that to discharge the retiring partner, it must appear, that the creditor accepted the separate security of the continuing partner, in discharge of the joint debt; and in the latter case, although the creditor knew that the continuing partner had agreed to pay all debts, and, with that knowledge had taken a bill from him, for the payment of which, when due, he afterwards allowed two months, yet the Court, upon a motion for a new trial, ordered it, that it might be put to the jury whether the plaintiff had agreed to take, and did take, the bill in satisfaction of the joint debt. If, therefore, the cases in equity of claims against the estates of deceased partners are to be regulated by the same principle, there can be no doubt of the right conclusion in the present case, for there was no new security given; and instead of an intention appearing, or any agreement being proved, to release the estate of Mr. Winter, all the evidence proves directly the reverse. It cannot be disputed now that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors. When and by what means is that liability to terminate? Sir William Grant, in Vulliamy *v.* Noble (and he had much considered the question in Sleech's Case in Devaynes *v.* Noble), has answered the question. He says, 'The deceased partner's estate must remain liable in equity until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be before his liability ceases.' The discharge may be by direct payment, or by dealings with the continuing partner operating as payment of the joint debt, or, in the terms of Thompson *v.* Percival, the dealings may arise from the creditor's having agreed to take, and taking the security of the survivor in satisfaction of the joint debt; or there may be an equitable bar to the remedy, for (as Lord Eldon expresses it in Ex parte Kendall), 'As the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not upon general rules and principles be entitled to the benefit of the demand.' In the present case there is a total absence of any such equitable defence to the claim upon the estate of Mr. Winter, as there is of any intention or contract to abandon it. The more modern cases of Cowell *v.* Sikes, Wilkinson *v.* Henderson, and Braithwaite *v.* Britain, in addition to the former authorities, leave no doubt that in this case nothing has taken place which can bar Mr. Baillie's claim (admitted to have at one time existed), to compel payment of so much of the debt due to him from the firm as remains unpaid."

rity), no mere private agreement between the partners will vary their rights against such third person, unless it is assented to by the latter.[1] Thus, for example, if upon any change of the firm, the existing partnership debts should be assigned over to the new firm, that alone would not give any title to the new firm at law to sue the debtors therefor. But if in such a case, after such an assignment, and with full knowledge thereof, the debtors should assent thereto, and promise payment to the new firm, that would amount, by operation of law, to an extinguishment of the liability to the old firm, and to a transfer of the debts to the new firm; so that the old firm would no longer be entitled to sue therefor; but the right would be exclusively vested in the new firm.[2]

§ 255. In like manner, where a contract, originally made with a firm, is, by the consent of all the parties thereto, severed, and become a several contract with one of the parties, or, by assignment and consent of all the parties thereto, has been transferred by way of sub-

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[1] Collyer on Partn. B. 3, ch. 5, § 1, p. 466, 467, 3d edit.; Radenhurst *v.* Bates, 3 Bing. R. 470; Wilsford *v.* Wood, 1 Esp. R. 182.

[2] See 2 Story on Eq. Jurisp. § 1041 to 1046; Williams *v.* Everett, 14 East, R. 582; Yates *v.* Bell, 3 Barn. & Ald. 643; Grant *v.* Austin, 3 Price, R. 58; Tiernan *v.* Jackson, 5 Peters, R. 597 to 601; Evans *v.* Silverlock, 1 Peake, R. 21; McLanahan *v.* Ellery, 3 Mason, Cir. R. 269; Harris *v.* Lindsay, 4 Wash. Cir. R. 271. See Gow on Partn. ch. 3, § 1, p. 129, 130, 3d edit.— The case of King *v.* Smith (4 Carr. & Payne, 108), turned upon other distinct considerations. There it was agreed, upon a dissolution of the partnership, that A. (one of the partners) should receive all the debts due to the firm; and afterwards B., the other partner, drew a bill on C., a debtor of the firm, for the debt due to the firm, who accepted it; and it was held to be no defence to a suit by B. against C. on the acceptance, that there was the above stipulation on the dissolution; for, notwithstanding such stipulation, either partner might release or collect the debts due to the firm. But it would have been otherwise, if all the debts of the firm had been assigned to A., and in consideration thereof C. had promised to pay the debt to A., and then B. had sued for the same in the partnership name.

stitution to a third person, there would seem to be no doubt, that the liability to the partnership is extinguished by mere operation of law.[1] Why, in the case of an infant partner, who, before any action brought against a debtor to the firm, has disaffirmed his original connection with the firm, the contract should not, upon principle, be thereafter treated, as a several contract with the remaining partners, it is not easy to say; for thereby the contract would seem, as to the infant, to be void *ab initio*. But, upon the footing of authority, the point does not seem entirely free from difficulty.[2]

§ 256. Hitherto, we have been considering the rights of action and remedies at law, which partners may have against third persons, founded upon contracts made with the firm, and the manner in which the same may be qualified, suspended, severed, or extinguished, by the subsequent acts of one or all of the partners. Let us now proceed to the consideration of the rights of action and remedies, which partners may have against third persons, founded upon the torts of the latter. And, here, it may be laid down as a general doctrine, that whenever a joint injury or damage is done to the property, or rights, or interests of the partnership by third persons, whether it be misfeasance, or malfeasance, or negligence, or omission of duty, or by positive conversion of their property, an action will lie at law, by all the partners (and, indeed in such an action they ought

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[1] See Thompson *v.* Percival, 5 Barn. & Adol. 925. See McLanahan *v.* Ellery, 3 Mason, R. 269; Hosack *v.* Rogers, 8 Paige, R. 229.

[2] The authorities on this subject are not easily reconcilable with each other. See Teed *v.* Elworthy, 14 East, R. 210; Goode *v.* Harrison, 5 Barn. & Ald. 157; Thornton *v.* Illingworth, 2 Barn. & Cresw. 826; Whitney *v.* Dutch, 14 Mass. R. 457; Tucker *v.* Moreland, 10 Peters, R. 58; Kell *v.* Nainby, 10 Barn. & Cresw. 210.

all regularly to join), to obtain due recompense and redress in damages.[1] Where, indeed, the injury is done to some, and not to all of the partners, they alone, who are injured, may bring an action therefor without joining the others; for torts are, or at least may be, in their nature, joint, as well as several; and, therefore, in contemplation of law, the rights of the parties vary accordingly.[2] Hence, if a third person should fraudulently collude with one partner to injure the others, even though the act might in other respects be an injury to the partnership; yet an action will lie by the other partners alone against such third person, so colluding, for the special damage occasioned thereby to themselves.[3] So, where words, which impute insolvency in trade, are spoken of one of the partners in a firm (which cannot fail in many cases to have some tendency to impair the credit of the firm itself), the injured partner may maintain a several action for the slander; and it is not necessarily to be considered as an injury, for which a joint action only can be maintained by the firm.[4]

§ 257. On the other hand, there is not the slightest doubt, that a joint action may be maintained by the firm for any defamation of the firm, or for any libel upon the firm; for this is, justly and properly speaking, a joint tort and injury, applicable to their collective rights and interests.[5] But in such a case the damages

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[1] Collyer on Partn. B. 3, ch. 5, § 2, p. 473, 474, 2d edit. See also Addison v. Overend, 6 Term R. 766; Bloxam v. Hubbard, 5 East, R. 407; Sedgworth v. Overend, 7 Term R. 275, 279; Gow on Partn. ch. 3, § 1, p. 133, 3d edit.; Id. p. 136.

[2] Ibid.

[3] Longman v. Pole, 1 Mood. & Malk. 223.

[4] Harris v. Beverington, 8 Carr. & Payne, R. 708.

[5] Collyer on Partn. B. 3, ch. 5, § 2, p. 473, 2d edit.; Cook v. Batchelor,

must be strictly limited to the injury sustained by the firm in their joint trade or business; and cannot be ex-

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3 Bos. & Pull. 150; Haythorne v. Lawson, 3 Carr. & Payne, 196. See Williams's note to Coryton v. Lithebye, 2 Saund. 117, a.; Forster v. Lawson, 3 Bing. R. 452. — In this latter case Lord Chief Justice Best said: "An objection has been made to the declaration in this case, namely, that the action has been brought by three persons jointly, and that they could not properly join in such an action. The general rule of law is, as laid down in the case of Smith v. Cooker, in Cro. Car. 513, namely, that where several persons are charged with being jointly concerned in a murder, each of them must bring a separate action for it; and the reason is, that they have no joint interest to be affected by the slander. Where, however, two persons have a joint interest affected by the slander, they may sue jointly; and the case of Cook v. Batchelor is not the first case which has determined this point. In the note in Saunders, to which the Court has been referred, the learned editor states, that two joint tenants or coparceners might join in an action for slander of the title to their estate; and the form of the declaration in such an action is to be found in Brownlow. This doctrine has also been recently considered and confirmed in the case of Collins v. Barrett, in which it was holden, that two persons might bring a joint action for a maliciously holding them to bail, if the complaint in the declaration was confined to the expenses which they were jointly put to in procuring their liberty. It has been said, that, notwithstanding the judgment against the defendants in this action, if either of the plaintiffs has sustained any separate damage, he may still maintain a separate action. I cannot see how there can be any separate damage. The business injured is the joint business, and the libel only affects the plaintiffs through their business. If, however, a copartnership be libelled, and the libel contains something which particularly affects the character of one of that firm, I think a joint action may be maintained against the libeller, who would have less reason to complain of such proceedings, than he would have if each partner brought a separate action for the injury done to the firm. Another objection raised by the defendant's counsel is, that the plaintiffs have not stated the proportion of interest, which each respectively had in their joint business. It is not necessary for them to do so; with their several proportions the defendant has nothing to do. Any compensation they may recover will belong to them generally, and it is nothing to the defendant, how it may be divided among them. It has also been urged, that the words contained in the paragraph are not actionable. I have no hesitation in deciding, that to say of any bankers, that they have suspended payment, is actionable. For what can be the meaning of such a statement, except that they are no longer solvent? Saying that a banker has suspended payment, is saying that he cannot pay his debts. A temporary inability to pay debts

tended to the injury done to the private feelings of the individual partners.[1]

§ 258. The same principle will apply to any other wrong, done by third persons, affecting the partnership trade or business; such as obstructing their business and employment, seducing persons from their service, or wrongfully soliciting and inducing their customers to withdraw their patronage from them by fraud, or threats, or otherwise; for in all such cases, a joint damage is done to the firm.[2]

§ 259. In the next place, as to remedies in equity by partners against third persons. It may be stated as the general doctrine, that the same remedies in equity will lie for the vindication of the rights, and the redress of the wrongs of the partnership, as ordinarily belong to

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is insolvency. The charge of suspending payment is a charge of insolvency. Such a statement will instantly bring all the creditors of a banking-house upon it, and completely stop their business by preventing any one from taking their bills. But here special damage is stated, and I think correctly stated. It has been objected, that the special damage is not set out with sufficient certainty. Even if that were so, advantage could be taken of it only by a special demurrer. In my opinion, however, the special damage is clearly and distinctly set out. The plaintiffs state that they had a number of promissory notes outstanding and in circulation, and that in consequence of these libels they were called upon and forced and obliged to pay those notes; how or when was not material, it being sufficient that they declare that they have thereby lost all the benefit and advantage which would otherwise have accrued to them in their trade and business, from the notes remaining outstanding and in circulation. The declaration goes even further; it states that the plaintiffs have suffered and sustained a great loss in raising and procuring sufficient money to pay and satisfy their several notes. It appears to me, that the declaration is unobjectionable, and that the plaintiffs are entitled to judgment."

[1] Haythorne v. Lawson, 3 Carr. & Payne, 196. See Robinson v. Marchant, 7 Adol. & Ell. New R. 918.

[2] Weller v. Baker, 2 Wils. R. 423; Coryton v. Lithebye, 2 Saund. R. 115, and Williams's note (2), p. 116.

private individuals.[1] Thus, for example, if one partner should collude with a third person to defraud the partnership by wrongfully using the partnership name, or negotiating the securities, or applying the property thereof for improper purposes, a Court of Equity would, by an injunction, restrain him from so doing.[2] So, if a third person should violate a copyright or patent right, belonging to a partnership, an injunction would, in like manner, lie to restrain him from such illegal conduct. So, if a separate creditor of one partner should knowingly aid in the misapplication of the partnership funds to the payment of his own debts, a Court of Equity would restrain him from so aiding in such misconduct; and, if he had so improperly received the funds thereof, it would compel him to restore the same to the partnership.[3] So, a Court of Equity will restrain a third person by injunction, who is injuring the partnership by vending an article of trade, similar to that manufactured by the partnership, falsely, under the name of the partnership, and as if manufactured by the same, and thus misleading the public, and diverting the patronage and custom from the partnership.[4] The same rule will apply to any other false and wrongful use of the partnership name and reputation, by deceptive imitations of the labels, devices, or ornaments used by the partnership upon their own manufactured cutlery, or vehicles, or medicinal preparations, or otherwise in the course of

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[1] Collyer on Partn. B. 3, ch. 7, p. 566, 2d edit.

[2] Gow on Partn. ch. 2, § 4, p. 107, 108, 109, 3d edit.; Collyer on Partn. B. 2, ch. 3, § 5, p. 234, 235, 2d edit.; Hood *v.* Aston, 1 Russ. R. 416; 1 Story on Eq. Jurisp. § 667, 669; 2 Ib. § 930 to 935.

[3] Ante, § 132, 133; Gow on Partn. ch. 2, § 4, p. 108; Collyer on Partn. B. 2, ch. 3, § 5, p. 234, 235, 2d edit.; Jervis *v.* White, 7 Ves. 413.

[4] 2 Story on Eq. Jurisp. § 951.

their business.[1] So, in like manner, an injunction will lie for a partnership to prevent a third person from publishing a magazine, or other periodical, in their names, after they have ceased to have any connection with it.[2]

§ 260. These cases all stand upon doctrines equally applicable to all persons, whether they are partners, or private individuals. But there is one case, which is peculiar to partnerships, and which, therefore, requires a distinct consideration in this place; and that is, the case of an execution levied upon the partnership property by a creditor, under a judgment for a separate debt against one partner. Where there is a joint suit and judgment against all the partners for a partnership debt, there is no doubt, at the common law, that the execution issuing thereon may be levied upon, and satisfaction had, either out of the partnership effects, or out of the separate effects of either of the partners (exactly, as in the case of other joint debtors, not partners);[3] and if one is compelled to pay or satisfy the whole debt, his remedy for contribution therefor lies exclusively in equity.[4]

§ 261. But the question, as to the right of seizure of partnership property for the satisfaction and discharge of the separate debt of one of the partners, is a matter

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[1] 2 Story on Eq. Jurisp. § 951; Motley v. Downman, 3 Mylne & Craig, 1, 14, 15; Millington v. Fox, 3 Mylne & Craig, 338; Knott v. Morgan, 2 Keen, R. 213, 219.

[2] 2 Story on Eq. Jurisp. § 951; Hogg v. Kirby, 8 Ves. 215.

[3] Ante, § 179, 189, 264; Collyer on Partn. B. 3, ch. 6, § 10, p. 557; Ex parte Ruffin, 6 Ves. 119, 126; Herries v. Jamieson, 5 Term R. 551, 554; Abbott v. Smith, 2 Wm. Black. R. 946, 947; Jones v. Clayton, 4 Maule & Selw. 349; Dutton v. Morrison, 17 Ves. 194, 205, 206.

[4] Ibid.

of a more complicated nature, and involves other conflicting rights and equities of the other partners. It seems clear, at the common law, that the sheriff, upon an execution upon a judgment against one partner for his separate debt, may seize in execution the tangible property of the partnership.[1] In such case, it has been said, that he should seize the whole or entirety of the goods, and not merely an undivided moiety or proportion thereof; for if he should seize only the moiety, or other proportion, the other partners would be entitled to their moiety or other proportion thereof.[2] It would, perhaps, be more accurate (at least according to the modern notions on this subject) to say, that the sheriff may seize, and should seize, the interest of the separate partner in the property of the partnership; and that, and that alone, he is at liberty to sell upon the execution.[3] What that interest is, or may be, it is impossible to ascertain in many cases, until a final adjustment of all the partnership concerns.[4] Yet, Courts of Law have said, that the sheriff may go on to sell that interest under the execution, however inconvenient it may be, and the purchaser at the sale must be content to take such

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[1] [But *quære*, whether the sheriff can take such goods into his possession, to the exclusion of the other partner. See Hill *v.* Wiggin, 11 Foster, 292.]

[2] Heydon *v.* Heydon, 1 Salk. 392; Chapman *v.* Coops, 3 Bos. & Pull. 289, 290; Jacky *v.* Butler, 2 Ld. Raym. 871; Skip *v.* Harwood, 2 Swanst. R. 586, 587; Dutton *v.* Morrison, 17 Ves. 194, 205, 206.

[3] Collyer on Partn. B. 3, ch. 6, § 10, p. 559, 560, 561, 2d edit.; Chapman *v.* Koops, 3 Bos. & Pull. 289, 290; Dutton *v.* Morrison, 17 Ves. 193, 206. In the matter of Wait, 1 Jac. & Walk. R. 585, 588; Rice *v.* Austin, 17 Mass. R. 197, 206, 207; Wilson *v.* Conine, 2 Johns. R. 282; Filley *v.* Phelps, 18 Conn. R. 294; Walsh *v.* Adams, 3 Denio, R. 125; Sutcliffe *v.* Dohoman, 18 Ohio, 181; Deal *v.* Bogue, 20 Penn. St. R. 228.

[4] 1 Story on Eq. Jurisp. § 667; Skip *v.* Harwood, 2 Swanst. R. 586; Nicholl *v.* Mumford, 4 Johns. Ch. R. 522; s. c. 20 Johns. R. 611.

an interest therein, as a tenant in common with the other partners, as the partner himself had therein.[1] For in every such case, the other partners have a lien upon the partnership property, as well for the debts due by the firm, as for their own shares and proportions thereof; and the judgment creditor, and the purchaser under him, must take it, subject to all such claims and liens.[2]

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[1] Collyer on Partn. B. 3, ch. 6, § 10, p. 559 to 562, 2d edit.; Fox *v.* Hanbury, Cowp. R. 441; Skip *v.* Harwood, cited in note to 3 Carr. & Payne, 310; Reynolds *v.* Everett, 4 Sneed, 531; Taylor *v.* Field, 4 Ves. 396; Pope *v.* Haman, Comb. R. 217; Ex parte Hamper, 17 Ves. 407; The matter of Smith, 16 Johns. R. 102, 106, and the Reporter's note; Skip *v.* Harwood, 2 Swanst. R. 586; s. c. under the name of West *v.* Skip, 1 Ves. 239; Id. 456; Chapman *v.* Koops, 3 Bos. & Pull. 289; Holmes *v.* Mentze, 4 Adol. & Ellis, 127; 1 Story, Eq. Jur. § 677, 678; Allen *v.* Wells, 22 Pick. R. 450.

[2] This subject was much considered in the case of Taylor *v.* Field, 4 Ves. 396. Lord Chief Baron Macdonald on that occasion, in delivering the opinion of the Court, said: "The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the *corpus* of the partnership effects is joint property, and neither partner separately has any thing in that *corpus;* but the interest of each is only his share of what remains after the partnership accounts are taken. In Skip *v.* Harwood, 1 Ves. 239, by the name of West *v.* Skip, we see that whatever the right of the partnership may be, it is not affected by what may happen between the individual partners. There is a distinction between the rights of the partners and the rights of the partnership. As between one partner and the separate creditors of the other, they cannot affect the joint stock any further than that partner whose creditor they are could have affected it. In Fox *v.* Hanbury, Cowp. 445, Lord Mansfield was led to the consideration of a point, that bears much upon this case; and adverting to the case of Skip *v.* Harwood, he states a passage of Lord Hardwicke's judgment from his own note rather stronger than it appears in the report: 'If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner.' What is the manner in which the debtor himself had it? He had that which was undivided, and could only be divided by first delivering the effects from the partnership debts. He who comes in as his companion, as joint tenant with him, according to this doctrine of Lord Hardwicke, must take it in the same manner the debtor himself had it, subject to the rights of the other partners. Lord Mansfield

§ 262. Strictly, indeed, and properly speaking, the sale does not, at least in the view of a Court of Equity,

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having stated what, according to the course of the common law, as far as it respects trade between partners, is the rule, that a creditor taking out execution against a partner, is directly in the place of the partner debtor, proceeds to show that by the same rule, where a partner becomes bankrupt, the assignees are put in the place of the partner in whose right they come in, and by no means, as was argued by Mr. Plumer, by any rule arising out of the bankrupt laws; for nothing is said in any one of those acts as to the creditors of a partnership, and the separate creditors of one partner; but they only provide for the case of mutual debts, and accelerating a debt upon a security payable at a future day. But the same common law applied in the case where one partner becomes a bankrupt, provides that the assignee of the bankrupt shall be in the same situation as that in which a creditor taking out execution stood before those acts. This introduces all the cases of bankruptcy which Mr. Plumer wished to exclude, as not applicable to a case in which there was no bankruptcy; and this case is to be considered as if no bankruptcy had taken place, as the execution was before the bankruptcy. In law there are three relations; first, if a person chooses for valuable consideration to sell his interest in the partnership trade, for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference. But in all those cases the application takes place of the rule, that the party coming in the right of the partner, comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts. A great deal has been said of the inconvenience. What is the inconvenience? It is true, the individual trusted to the partnership fund in his idea at the time he was lending the money; not that I believe that is very common. But it may be dangerous in a thousand instances to have any thing to do with a trader; as for instance, to purchase an estate; for an act of bankruptcy may have been committed five years before, which will reach the estate. But look to the danger on the other side; one partner giving a bond, and the creditors of the partnership looking to the stock itself. It is said, that in this case the joint creditors had done nothing; and this meritorious creditor has a right to be preferred on account of his early diligence. But what is that to which he is entitled? The estate of a partner is debtor to him. The question, therefore, recurs to the consideration, what it was that partner had; for the creditor cannot be entitled to any more. It therefore argues nothing to say, he has the merit of diligence, till we see upon what that merit can attach. If the partner himself, therefore,

transfer any part of the joint property to the purchaser, so as to entitle him exclusively to take it or withhold

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had nothing more than an interest in the surplus beyond the debts of the partnership upon a division, if it turns out that at common law that is the whole that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy, all that is delivered to the creditor, taking out the execution, is the interest of the partner in the condition and state he had it; and nothing was due to this partner separately, the partnership being insolvent. The whole property was due to the partnership creditors, and not to either partner." See also Dutton *v.* Morrison, 17 Ves. 194, 205, 206. In the very recent case of Allen *v.* Wells (22 Pick. R. 450), Mr. Chief Justice Shaw, in delivering the opinion of the Court, said: "The conflicting claims of copartnership and separate creditors have been a fruitful source of litigation in England. The questions more usually have arisen under the bankrupt law, and the decisions are mostly to be found in the Chancery Reports, but not exclusively so. The great number of cases in which this question has arisen, shows very clearly, that there could have been at the time no very well defined general principles, known and acknowledged as such, applicable to the adjustment of these conflicting rights. Even as regards the joint property of partners, the rule has varied. By the rules of law as formerly held in England, the sheriff, under an execution against one of two copartners, took the partnership effects and sold the moiety of the debtor, treating the property as if owned by tenants in common. Heydon *v.* Heydon, 1 Salk. 392; Jacky *v.* Butler, 2 Ld. Raym. 871. But the principle is now well settled in England, both at law and in equity, that a separate creditor can only take and sell the interest of the debtor in the partnership property, being his share upon a division of the surplus, after discharging all demands upon the copartnership. Fox *v.* Hanbury, Cowp. 445; Taylor *v.* Field, 4 Ves. 396. The same fluctuation in the rule, as to partnership property, has existed in the United States. The rule of selling the moiety of the separate debtor in the partnership property on an execution for his private debts, formerly prevailed in several of the States of the Union. But the later decisions have changed the rule, and that now more generally adopted is in accordance with the one prevailing in England, and which has been already mentioned. The State of Vermont still adheres to the doctrine, that partnership creditors have no priority over a creditor of one of the partners, as to the partnership effects. Reed *v.* Shepardson, 2 Vermont R. 120. The rule in Massachusetts, giving a priority to the partnership creditor in such cases, was settled in the case of Pierce *v.* Jackson, 6 Mass. R. 242, and has been uniformly followed since. The effect of the rule that the only attachable interest of one of the copartners by a separate creditor, was the surplus

it from the other partners; for that would be to place him in a better situation than the execution partner himself, in relation to the property.[1] [And if he excludes the other partners from possession, they may have an action against him.[2]] But it gives him a right to a bill in equity, calling for an account and settlement of the partnership concerns, and thus to entitle himself to that interest in the property, which, upon the final adjustment and settlement of the partnership concerns, shall be ascertained to belong to the execution partner; and nothing more.[3] How utterly inadequate a Court of Law is to furnish suitable means for taking such an account, needs scarcely to be suggested; and, indeed, the very difficulty of ascertaining what interest can be conveyed to the purchaser before such an adjustment and settlement are made, has induced very learned minds to doubt whether a Court of Law is competent to order any sale, before the exact amount of the interest of the partner therein is thus ascertained.[4]

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of the joint estate which might remain after discharging all joint demands upon it, necessarily was to create a preference in favor of the partnership creditors in the application of the partnership property; and this effect would be produced, although the original purpose of the rule might have been the securing the rights of the several copartners, as well as those of their joint creditors. Whatever may have been the object of the rule, the rule itself is now to be considered as well settled, as to the appropriation of the partnership effects."

[1] Story on Eq. Jurisp. § 667. But see Burrall *v.* Acker, 23 Wend. R. 606.

[2] Newman *v.* Bean, 1 Foster, 93; Page *v.* Carpenter, 10 N. H. R. 81; Morrison *v.* Blodgett, 8 N. H. R. 245.

[3] 1 Story on Eq. Jurisp. § 677; Chapman *v.* Koops, 3 Bos. & Pull. 289, 290, 291; Dutton *v.* Morrison, 17 Ves. 194, 205, 206.

[4] Waters *v.* Taylor, 2 Ves. & Beames, R. 300, 301; Dutton *v.* Morrison, 17 Ves. 193, 206, 207; In the matter of Wait, 1 Jac. & Walk. 585, 588.— In the case of Waters *v.* Taylor, Lord Eldon said: "If the Courts of Law have followed Courts of Equity in giving execution against partnership effects, I desire to have it understood that they do not appear to me to

§ 263. In cases of this sort, therefore, the real position of the parties, relatively to each other, seems to be this. The partnership property may be taken in execution upon a separate judgment and execution against one partner; but the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the

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adhere to the principle, when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the old law, I mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor without reference to the partnership account; but a Court of Equity would have set that right by taking the account and ascertaining what the sheriff ought to have sold. The Courts of Law, however, have now repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting that a Court of Equity ascertained, previously, what was to be sold. How could a Court of Law ascertain what was the interest to be sold, and what the equities, depending upon an account of all the concerns of the partners for years?" And again, in the matter of Wait (1 Jac. & Walk. 588), he said: "In my long course of practice, I have never been able to reconcile all the decisions which have taken place on partnership property with respect to joint and separate estate; nor have I ever been able very clearly to see my way in the application of the doctrine which has been held in some of the late cases on this subject. I conceive originally the law was, that if there was a separate creditor of a partner, he might lay hold of any chattels belonging to the partnership, and take a moiety of them, or whatever other proportion that partner might be entitled to in the effects of the partnership. But at law, somehow or other, they now contrive to take an account which ascertains what is the interest of the debtor in the effects taken in execution; and when you put the question, what is that interest, nothing can be more clear than that it is that which would result to him when all the accounts of the partnership were taken. This equity, which has been transferred into the proceedings of a Court of Law, I apprehend, subsisted here long before; a separate creditor applying for satisfaction of his debt out of the partnership estate by means of an equitable execution, must have taken it upon equitable terms. There has been a great deal of reasoning as to the rights of partners, with reference to the execution of a separate creditor; but it always appeared to me that the interest of the individual partner was all which a creditor of that individual could take, and that he must take it subject to all the partnership dealings."

other partners and the joint creditors therein.[1] By such seizure the sheriff acquires a special property in the goods seized;[2] and the judgment creditor himself may, and the sheriff, also, with the consent of the judgment creditor may, file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained; but he may require the sheriff immediately to proceed to a sale, which order the sheriff is bound by law to obey,[3] [and he is not liable to the other partners for so selling.[4]] In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest, which he has acquired by the sale.[5] [And if he sell the entire goods he is

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[1] Taylor *v.* Field, 4 Ves. 396; Ante, § 261, 262; Skip *v.* Harwood, 2 Swanst. 586, 587; Holmes *v.* Mentze, 4 Adol. & Ell. 127; Harvey *v.* Crickett, 5 Maule & Selw. 336; Dutton *v.* Morrison, 17 Ves. 194, 205, 206.

[2] Wilbraham *v.* Snow, 2 Sand. R. 46, c., and Williams's notes, Ibid.

[3] Parker *v.* Pastor, 3 Bos. & Pull. 288; Chapman *v.* Koops, 3 Bos. & Pull. 389, 390; Holmes *v.* Mentze, 4 Adol. & Ell. 127.

[4] McPherson *v.* Pemberton, 1 Jones (N. C.), 378.

[5] Chapman *v.* Koops, 3 Bos. & Pull. 389, 390; Ex parte Hamper, 17 Ves. 407; Bevan *v.* Lewis, 1 Sim. R. 376; Skip *v.* Harwood, 2 Swanst. R. 586, 587; Taylor *v.* Field, 4 Ves. 469; Barker *v.* Goodair, 11 Ves. 78, 85; Gow on Partn. ch. 3, § 2, p. 144, 3d edit.: 1 Madd. Ch. Pr. 131; Eden on Injunct. 31; Collyer on Partn. B. 3, ch. 6, § 10, p. 557 to 565, 2d edit. In Massachusetts it has been held, that an attachment of partnership goods, on a suit against one partner, is not valid against a subsequent attachment on the same goods by a creditor of the partnership. Pierce *v.* Jackson, 6 Mass. R. 242. On this occasion, Mr. Chief Justice Parsons said: "At common law, a partnership stock belongs to the partnership, and one partner has no interest

liable to a subsequent trustee of the firm for a moiety of the goods so sold.[1]]

[§ 263 *a*. It is equally an interesting question whether the converse of the rule alluded to in the preceding sections is recognized at law; that is, whether the preference of a separate creditor of a partner, to be paid out of the separate estate of his debtor, before the creditors of the partnership, can be enforced and secured *at law*. In some Courts it is held that the lien acquired by a partnership creditor, by an attachment of the separate property of one partner, cannot be defeated by a sub-

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in it, but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe to the firm. Consequently all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest, but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution. There are several cases by which these principles, so reasonable and equitable, are recognized and confirmed." The same doctrine prevails in New Hampshire. Tappan *v.* Blaisdell, 5 New Hamp. R. 190. See Morton *v.* Blodgett, 8 New H. R. 238. Thompson *v.* Lewis, 34 Maine, 167. The doctrine, however, has not been applied to cases of mere dormant partners, against the creditors of the ostensible partners. Lord *v.* Baldwin, 6 Pick. R. 348; French *v.* Chase, 6 Greenl. R. 166. Van Valen *v.* Russell, 13 Barbour, 592. See also Church *v.* Knox, 2 Connect. R. 514; Brewster *v.* Hammett, 4 Connect. R. 540; Barber *v.* Hartford Bank, 9 Connect. R. 407; Donner *v.* Stuffer, 1 Penn. R. 198; Knox *v.* Summers, 4 Yeates, R. 477. Whether the like priority would be allowed at law, in favor of an execution by a joint creditor, against the execution of a separate creditor of one partner in England, does not appear to have been made a question for argument. But it is probably owing to the fact, that, at all events, in equity the priority would be sustained, where the partnership is insolvent, in a proper bill filed for the purpose. Could such a bill be filed by the joint creditor? Or, should his rights be worked out through the equities of the other partners? See 1 Story on Eq. Jurisp. § 675; Ante, § 97; Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3, 5.

[1] Latham *v.* Simmons, 3 Jones (N. C.), 27.

sequent attachment of the same property, by a separate creditor of the partner owning such property.[1] But a contrary view has been taken in more recent cases, and it has been thought to be a branch and member of the same equitable doctrine that the right of private creditors to look to private property, should be paramount to the right of joint creditors, although the latter might have commenced the first process against the private estate. Accordingly it was held, in a recent case, that where land of one partner had been set off on execution for a debt due from the partnership, and afterwards the same land was set off on execution for a separate debt of the same partner, the separate creditor of such partner could recover the land from the creditor of the partnership, by a writ of entry.[2] Whether such a preference is to be observed in Equity, when there are no partnership funds, is more questionable.[3]]

§ 264. In cases of the seizure of the joint property for the separate debt of one of the partners, a question has arisen, whether a Court of Equity ought to interfere, upon a bill for an account of the partnership, to restrain the sheriff from a sale, or the vendee of the

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[1] Allen v. Wells, 22 Pick. 450; Newman v. Bayley, 16 Pick. 570.

[2] Jarvis v. Brooks, 3 Foster, 136. And see Merrill v. Neil, 8 How. 414; Crockett v. Crain, 33 N. H. R. 542. But see Baker v. Wimpee, 19 Geo. 87.

[3] Bardwell v. Perry, 19 Vermont, 292. Washburn v. Bellows, Id. 278. In these cases it was held that in equity both separate and partnership creditors have the same rights to the separate estate of the partners, after the partnership funds are exhausted, and that separate creditors cannot prevent joint creditors from sharing equally with them in the separate estate, when there are no partnership funds. See the able judgments of Redfield, Chancellor.

sheriff from an alienation of the property seized, until the account is taken, and the share of the partner is ascertained. Mr. Chancellor Kent has decided, that an injunction for such a purpose ought not to issue to restrain a sale by the sheriff, upon the ground, that no harm is thereby done to the other partners; and the sacrifice, if any, is the loss of the judgment debtor only.[1] But that does not seem to be a sufficient ground upon which such an injunction should be denied. If the debtor partner has, or will have, upon a final adjustment of the accounts, no interest in the partnership funds; and if the other partners have a lien upon the funds, not only for the debts of the partnership, but for the balance ultimately due to them; it may most materially affect their rights, whether a sale takes place, or not. For, it may be extremely difficult to follow the property into the hands of the various vendees; and the lien of the other partners may, perhaps, be displaced, or other equities arise by intermediate *bonâ fide* sales of the property in favor of the vendees, or other purchasers without notice; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees.[2] To prevent multiplicity of suits, and irreparable mischiefs, and to insure an unquestionable lien to the partners, it would seem perfectly proper, in cases of this sort, to restrain any sale by the sheriff. And besides; it is also doing some injustice to the judgment debtor, by compelling a sale of his interest under circumstances in which there must generally, from its uncertainty and litigious char-

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[1] Moody *v.* Payne, 2 Johns. Ch. R. 548, 549.

[2] See Skip *v.* Harwood, 2 Swanst. R. 586, 587.

acter, be a very great sacrifice to his injury. If he has no right, in such a case, to maintain a bill to save his own interest, it furnishes no ground why the Court should not interfere in his favor, through the equities of the other partners. This seems (notwithstanding the doubts suggested by Mr. Chancellor Kent) to be the true result of the English decisions on this subject; which do not distinguish between the case of an assignee of a partner, and that of an executor or administrator of a partner, or of the sheriff, or of an assignee in bankruptcy.[1]

[§ 264 *a*. Another question sometimes arising from the law of partnership is, how far a person indebted to a partnership, may be summoned into Court by process of foreign attachment, and be charged for goods, effects, or credits in his hands, as the trustee of *one partner*, in a suit by a separate creditor. It has been claimed that since the separate creditor of each partner may levy his execution against one partner upon the joint estate of the partnership (when such estate consists of tangible property), and may sell on execution the interest of such partner, whatever it may be, in the partnership goods, the same rule applies to proceedings by foreign attachment, and that the interest of each partner in a

[1] See Taylor *v.* Field, 4 Ves. 396, 397, 398; s. c. 15 Ves. 559, note; Barker *v.* Goodair, 11 Ves. 85, 86, 87; Skip *v.* Harwood, 2 Swanst. R. 586, 587; Franklin *v.* Thomas, 3 Meriv. R. 234; Hawkshaw *v.* Parkins, 2 Swanst. 548, 549; Parker *v.* Pistor, 3 Bos. & Pull. 288, 289; Eden on Injunct. 31; Collyer on Partn. B. 3, ch. 6, § 10, p. 557 to 565, 2d edit.; 1 Madd. Ch. Pr. 112. See also Brewster *v.* Hammett, 4 Connect. R. 540. See also Mather *v.* Smith, 16 Johns. R. 106, and the Reporter's learned note; Gow on Partn. ch. 3, § 2, p. 142, 3d edit.; Id. ch. 4, § 1, p. 203 to 211; Id. ch. 5, § 2, p. 229; Id. § 3, p. 307, 308. See 1 Story on Eq. Jurisp. § 678.

debt due the partnership from the trustee may be reached by this process; and some decisions countenance this view;[1] on the other hand, a juster rule has been more frequently adopted in other Courts, and it is now held by the current of authorities, that a trustee, under such circumstances, can not be charged. To hold otherwise would be creating a severance of a joint debt, and would lead to great embarrassment and confusion in determining the rights of all parties.[2]]

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[1] Whitney *v.* Munroe, 19 Maine, 42. And see Thompson *v.* Lewis, 34 Maine, 167.

[2] Fisk *v.* Herrick, 6 Mass. 271; Lyndon *v.* Gorham, 1 Gallison, 367; Hawes *v.* Waltham, 18 Pick. 451; Upham *v.* Naylor, 9 Mass. 490; Church *v.* Knox, 2 Conn. 514; Mobley *v.* Lombat, 7 How. 318; Barber *v.* Hartford Bank, 9 Conn. 407; Pettes *v.* Spalding, 21 Verm. 66; Cook *v.* Arthur, 11 Iredell, 407.

CHAPTER XIII.

DISSOLUTION OF PARTNERSHIP.

§ 265. Having considered the various topics belonging to the original formation of the contract of partnership, the rights of the partners in and over the partnership property and effects, the powers and authorities of each of the partners, relative to the partnership property, effects, and concerns; the liabilities of the partners to third persons, and *inter sese*, and the various remedies and modes of redress by and against partners, existing at law and in equity, we come, in the next place, to the consideration of the modes, in which a partnership may be dissolved. And this part of our subject may be conveniently discussed under three distinct heads. (1.) Dissolution by the act or agreement or consent of the parties, or of some of them; (2.) Dissolution by the decree of a Court of Equity; (3.) Dissolution by the mere operation of law.

§ 266. The Roman law in like manner declared, that partnership might be dissolved in various ways; as by the extinction of the thing held in partnership; or of the persons forming it; or of the rights of action growing out of it; or of the will of the parties to the continuance of it. *Societas solvitur ex personis, ex rebus, ex voluntate, ex actione. Ideoque, sive homines, sive res, sive voluntas, sive actio interierit, distrahi videtur societas.*[1] Of

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[1] Dig. Lib. 17, tit. 2, l. 63, § 10; Pothier, Pand. Lib. 17, tit. 2, n. 54, 55, 62, 64, 70; Ante, § 84, 85.

course, any partnership whatsoever, whether it be for a definite period, or for an indefinite period, may be at any time dissolved, at the mutual will and pleasure of all the partners. *Diximus* (says the Digest), *dissensu solvi societas; hoc ita est, si omnes dissentiunt.*[1] And the same rule must be recognized in the jurisprudence of every country, acting upon the mere dictates of reason and natural justice.

§ 267. According to Pothier, partnership is dissoluble under the old French law, (1.) By the expiration of the time, for which it is contracted; (2.) By the extinction of the thing, or the completion of the business; (3.) By the natural or civil death of some one of the partners; (4.) By his failure or bankruptcy; or, (5.) By the voluntary expressed intention of being no longer in partnership.[2] Substantially the like distinction exists in the present Civil Code of France, and in that of Louisiana.[3] The same causes of dissolution are also recognized in the Scottish law, the Spanish law, the law of Holland, and probably in that of the other continental nations, which derive the basis of their jurisprudence from the Roman law.[4] This general coincidence of opinion, in assigning the same causes for the dissolution of partnership, in so many countries, shows, that the doctrine has its true foundation in the general principles of natural justice and reason, rather than in the peculiar institutions of any particular age or nation.

§ 267 *a.* Let us, in the first place, consider the cases of dissolution, at the common law, by the act, or agree-

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[1] Dig. Lib. 17, tit. 2, l. 65, § 3; Pothier, Pand. Lib. 17, tit. 2, n. 64.

[2] Pothier, de Societé, n. 138.

[3] Code Civil of France, art. 1865; Code of Louisiana, art. 2847.

[4] Ersk. Inst. B. 3, tit. 3, § 25; Johnson's Inst. of Laws of Spain, tit. 15, p. 232; Van Leeuwen, Comm. B. 4, ch. 23, § 1.

ment, or consent of the parties themselves, or of some of them; and this will properly include all cases, where the partnership is merely at will, or is for a prescribed period, which expires by efflux of time, or otherwise, according to its own limitation, or is voluntarily dissolved by mutual consent within the prescribed or limited period.

§ 268. In respect to all partnerships, whether they are for a limited period, or at will, it is very clear, that they may at any time be dissolved by the mutual pleasure clearly expressed of all the parties. And this is so consonant to reason and justice, that it would seem to require no authority to support it. Nevertheless, the Roman law has expressly recognized it; and only put the question, as worthy of inquiry, when and under what circumstances the partnership might be dissolved at the will of one partner. *Diximus* (says the Digest) *dissensu solvi societatem; hoc ita est, si omnes dissentiunt. Quid ergo si unis renuntiet?*[1] But there is a technical principle of the common law, which seems to require, that when the partnership is formed by deed for a definite period, that it can properly, according to the common law, be dissolved only by deed; for here the maxim is held to apply: *Eodem modo, quo quid oritur, eodem modo dissolvitur.*[2] The same rule would seem to have been adopted in the Roman law. Thus, it is said in the Di-

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[1] Dig. Lib. 17, tit. 2, l. 65, § 3; Pothier, Pand. Lib. 17, tit. 2, n. 68.

[2] Ante, § 117; Bac. Abridg. *Release*, A. 1; 2 Saund. R. 47 (s), Williams's edit.; Story on Agency, § 49; Collyer on Partn. B. 2, ch. 2, § 2, p. 154, 155, 2d edit.; Doe *v.* Miles, 1 Stark. R. 181; Rackstraw *v.* Imber, 1 Holt, R. 368; Countess of Rutland's Case, 5 Co. R. 26; Blake's Case, 6 Co. R. 44; 1 Montagu on Partn. Pt. 3, ch. 1, p. 90 [113]. [Although the partnership agreement be under seal, *it seems*, it is not necessary that an agreement for dissolution should be also under seal Wood *v.* Gault, 2 Md. Ch. Dec. 433.]

gest: *Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est. Ideo verborum obligatio, verbis tollitur; nudi consensus obligatio contrario consensu dissolvitur.*[1] *Prout quidque contractum est, ita et solvi debet; *ut cum re contraxerimus, re solvi debet.*[2] However this may be, it is very clear, that a dissolution actually made by the parties will be held in equity perfect and complete, to all intents and purposes, between the parties, and also as to third persons, having full notice thereof.[3]

§ 269. In respect to partnerships, where no certain limit of their duration is fixed, they are deemed to be mere partnerships at will, and, therefore, are ordinarily at the common law dissolvable at the will of any one or more of the partners; for in such cases, as the contract subsists only during the pleasure of all the partners, it is therefore naturally and necessarily dissolved by the pleasure of any one or more of them, like every other contract existing at the mere will of both parties.[4]

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[1] Dig. Lib. 50, tit. 17, l. 35; Ante, § 118.

[2] Dig. Lib. 46, tit. 3, l. 80; Pothier, Pand. Lib. 50, tit. 17, n. 1388; Story on Agency, § 49, note (4); Ante, § 118.

[3] Collyer on Partn. B. 2, ch. 2, § 2, p. 154, 155, 2d edit.

[4] Ante, § 84; 3 Kent, Comm. Lect. 43, p. 53, 4th edit.; 1 Montagu on Partn. Pt. 3, ch. 1, p. 90, [113]; Watson on Partn. ch. 7, p. 381, 2d edit.; Master *v.* Kirton, 3 Ves. 74; Griswold *v.* Waddington, 15 Johns. R. 57; Heath *v.* Sansom, 4 Barn. & Adol. 172; Marquand *v.* New York Manufact. Co. 17 Johns. R. 525; Miles *v.* Thomas, 9 Sim. R. 606, 609; Nerot *v.* Burnard, 4 Russ. R. 247, 260.—Mr. Chancellor Kent, in this place, says: "It is an established principle in the law of partnership, that, if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership. The civil law contains the same rule on the subject. The existence of engagements with third persons does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected, and the partnership will still continue as to all antecedent concerns, until they are duly adjusted and settled. A reasonable notice of the dissolution might be very advantageous to the company, but it is not requisite; and a partner may, if he pleases, in a case

The general rule, in all such cases, is, *Dissociamur renunciatione.*[1]

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free from fraud, choose a very unreasonable moment for the exercise of his right. A sense of common interest is deemed a sufficient security against the abuse of the discretion." In Peacock *v.* Peacock, 16 Ves. 56, Lord Eldon said: "With regard to what passed, since the question was much agitated at the Bar, whether this partnership is now dissolved by the notice in writing from the defendant, that from and after the date of that notice the partnership should be considered dissolved. The plaintiff insists, that it is not dissolved; and that it can be dissolved only upon reasonable notice. I have always taken the rule to be, that in the case of a partnership, not existing as to its duration by contract between the parties, either party has the power of determining it, when he may think proper; subject to a qualification, that I shall mention. There is, it is true, inconvenience in this; but what would be more convenient? In the case of a partnership expiring by effluxion of time, the parties may by previous arrangement provide against the consequences; but where the partnership is to endure so long as both parties shall live, all the inconvenience from a sudden determination occurs in that instance, as much as in the other case. I cannot agree, that reasonable notice is a subject too thin for a jury to act upon, as in many cases juries and courts do determine what is reasonable notice. With regard to the determination of contracts upon the holding of lands, when tenancy at will was more known than it is now, the relation might be determined at any time; not as to those matters, which during the tenancy remained a common interest between the parties; but as to any new contract the will might be instantly determined. When that interest was converted into the tenancy from year to year, the law fixed one positive rule for six months' notice; a rule, that may in many cases be very convenient; in others, that of nursery grounds, for instance, most inconvenient. As to trades, in general, there is no rule for the determination of partnership; and I never heard of any rule with regard to different branches of trade; and, supposing a rule for three months' notice, that time might in one case be very large; and in another, in the very same trade, unreasonably short. I have, therefore, always understood the rule to be, that, in the absence of express contract, the partnership may be determined, when either party thinks proper, but not in this sense; that there is an end of the whole concern. All the subsisting engagements must be wound up; for that purpose they remain with a joint interest; but they cannot enter into new engagements. This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some different doctrine might have fallen from the Court

[1] 2 Bell, Comm. B. 7, ch. 2, p. 631, 5th edit.; Pothier, Pand. Lib. 17, tit. 2, n. 54.

§ 270. The same rule equally prevails in the Roman law.[1] *Manet autem societas* (say the Institutes) *eo usque, donec in eodem consensu perseveraverint. At cum aliquis renuntiaverit societati, solvitur, societas;*[2] or (as it is expressed in the Code), *Tamdiu societas durat, quamdiu consensus partium integer perseverat.*[3] And Vinnius has remarked upon the coincidence, in this respect, of the contract of partnership with that of mandate. *Societas et mandatum in eo conveniunt, quod proprio quodam jure, et suis quibusdam modis solvantur, quos Justinianus, quoniam ab iis modis, quibus jure communi obligatio tollitur, remoti sunt, explicare voluit.*[4] And, after alluding to the fact, that in common contracts the obligation thereof can be extinguished only by the consent of all the parties, he adds, that it is otherwise in relation to the contract of partnership. *Sed illud proprium hujus contractus (societatis) est, quod etiam postquam res integra esse desiit, id est postquam jam collatio et communicatio facta est, ab eo recedi, et vel unius voluntate potest; quo modo in specie dicitur societas dissolvi renuntiatione.*[5] This also is the clear result of the

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at Guildhall; but upon inquiry from the Lord Chief Justice, as to his conception of the rule, I have no reason to believe, that, if this notice had been given before the trial, the jury would not have been directed to find that the partnership was, by the delivery of that paper, dissolved." See also Featherstonhaugh *v.* Fenwick, 17 Ves. 299, 308, 309; Crawshay *v.* Maule, 1 Swanst. R. 495, 508*; Heath *v.* Sansom, 4 Barn. & Adol. 172.

[1] Pothier, Pand. Lib. 17, tit. 2, n. 64; Ante, § 84, 85.

[2] Inst. Lib. 3, tit. 26, § 4.

[3] Cod. Lib. 4, tit. 37, l. 5; Pothier, Pand. Lib. 17, tit. 2, n. 69; Id. n. 64; Domat, B. 1, tit. 8, § 5, art. 1, 2; Ante, § 84, 85.

[4] Vinn. ad Inst. Lib. 3, tit. 26, § 4.

[5] Vinn. ad Inst. Lib. 3, tit. 26, § 4, Comm. Introd. n. 1; Pothier, Pand. Lib. 17, tit. 2, n. 64 to 68.—Vinnius proceeds to give the reasons of this doctrine, and holds that it is so fundamental, that it cannot be varied by express agreement: "Hoc in contractu societatis jure singulari receptum est contra regulas communes de dissolvendis obligationibus. Idque duplici de causa; primum, quia socii officium invicem præstant, et accipiunt; deinde

French law, as Pothier has instructed us, under ordinary circumstances.[1] Indeed, to so great an extent did the Roman law carry its doctrine, that (as we shall presently see) a positive stipulation against its dissolution at the will of either of the partners was held to be utterly void, as inconsistent with the true nature, and interests, and confidence of that relation.[2]

§ 271. A partnership at will is presumed to endure so long as the parties are in life and have a capacity to continue it.[3] The dissolution of it, either by death or by a supervenient incapacity, will of course come under consideration when we speak of dissolution by mere operation of law. At present it is only necessary to say, that a dissolution may be made not only by a positive or express renunciation thereof by one partner, but also by implication from his acts and conduct; or as Vinnius expresses it: *Porro autem renuntiatione dissociamur, aut voluntate aperta, aut tacita.*[4] *Aperta, cum cæteris nuntiatur, ut res suas sibi habeant atque agant.*[5] Of express

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quia non bene convenit cum natura et conditione societatis, quæ rationem quamdam et jus fraternitatis habere creditur, aliquem invitum retinere in communione; quippe cujus materia discordias inter non consentientes excitare solet. Adeo autem visum est ex natura esse societatis, unius dissensu totam dissolvi, ut, quamvis ab initio convenerit, ut societas perpetuo duraret, aut ne liceret ab ea resilire invitis cæteris; tamen tale pactum, tanquam factum contra naturam societatis, cujus in æternum nulla coitio est. Nam, quod Paulus scribit, societatem etiam in perpetuum coiri posse, nihil aliud significat, quam sine ulla temporis præfinitione, aut donec socii vivant; quæ conventio non hoc operatur, ut non liceat abire, sed ut solo lapsu temporis non finiatur societas."

[1] Pothier, de Societé, n. 149.

[2] Ibid.; Pothier, de Societé, n. 145; Ante, § 85; Dig. Lib. 17, tit. 2, l. 14; Pothier, Pand. Lib. 17, tit. 2, n. 68.

[3] Collyer on Partn. B. 1, ch. 2, § 1, p. 68, 2d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 631, 632, 5th edit.; Pothier, de Societé, n. 65; Ante, 84.

[4] Vinnius, ad Inst. Lib. 3, tit. 26, § 4, Comm. n. 1; Ante, § 84, 85.

[5] Vinnius, ad Inst. Lib. 3, tit. 26, § 4, Comm. n. 1; Ante, § 84, 85.

renunciation it scarcely seems necessary to say any thing, when the partnership is merely at will; since it can make no difference whether it originated by mere consent, or by verbal agreement, or by written articles, or by any instrument under seal; for in each and every of these cases the same doctrine will prevail, whether the renunciation be by parol, or in writing, or by declaration under seal.[1] For the rule of the common law already referred to has here no just application, that the dissolution must be by an instrument of as high a nature as that by which it was created, according to the maxim: *Eodem modo, quo quid constituitur, eodem modo dissolvitur;*[2] or, as it is sometimes expressed: *Nihil tam conveniens est naturali æquitati, quam unumcumque dissolvi eo ligamine, quo ligatum est;*[3] which is certainly open to much question as a doctrine of natural equity, if we are to understand thereby that it is the only effectual mode of working a dissolution thereof.

§ 272. As to dissolution by tacit renunciation, or by implication from circumstances,[4] it may arise in various ways, as by the withdrawal of a partner from the business of the partnership, and engaging in other concerns, or by his refusal to act with the other partners in the business; or by his assigning over his share in the partnership;[5] or by his doing any other act utterly incon-

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[1] But see Doe dem. Waithman v. Miles, 1 Stark. R. 181.

[2] Branch's Maxims, p. 47, 5th edit., 1824; 6 Co. Rep. 53; Ante, § 268.

[3] The Countess of Rutland's Case, 5 Co. Rep. 26; Blake's Case, 6 Co. Rep. 44; 2 Inst. 359; Ante, § 268.

[4] Fellows v. Wyman, 33 N. H. R. 355.

[5] Marquand v. New York Manufac. Co. 17 Johns. R. 525; Ketcham v. Clark, 6 Johns. R. 144; Per Lord Chief Justice Denman, in Heath v. Sansom, 4 Barn. & Adol. 175; Rodriques v. Hefferman, 5 Johns. Ch. R. 417.

sistent with the continuing relation of partnership. Vinnius has enumerated several modes under the Roman Law, by which a tacit renunciation took effect, upon the ground of their inconsistency with the relation of partnership; (1.) by a novation of the action, *Pro Socio*, effected by one of the partners; (2.) by an action brought by one partner against the others for the purpose of dissolving the partnership; (3.) by each partner separately engaging in business, and acting for his own sole account.[1] This last ground is pointedly adverted to in the Roman law. *Itaque, cum separatim socii agere cœperunt, et unusquisque eorum sibi negotietur, sine dubio jus societatis dissolvitur.*[2]

§ 273. And here the question was greatly discussed in the Roman law, whether the right of renunciation of a partnership could be exercised at any time by any partner at his mere will and pleasure, however unreasonable, or even injurious it might be to the other partners. It was held, that it was competent for any partner to renounce the partnership, whether it was a partnership at will, or for a fixed period of time, even although he had expressly stipulated to the contrary, provided he acted with good faith, and without any sinister motive, and provided, further, that the time

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[1] Vinnius, Inst. Lib. 3, tit. 26, § 4, Comm. n. 2.—The language of Vinnius is: "Tacita voluntas renuntiandi tribus his factis evidenter arguitur; (1.) novatione actionis pro socio ab uno ex sociis facta, quod etiam significat Ulpianus, cum dicit, societatem etiam ab actione, seu ab interitu actionis distrahi; (2.) actione pro socio ab uno adversus alios instituta distrahendæ societatis causa; (3.) cum separatim agere cœperint, et sibi quisque negotiari; veluti, si Typographi aliquot, qui antea communibus sumptibus libros imprimendos curabant, postea singuli domi suæ sibi imprimere cœperint, et commune impendium facere desierint, tacite renuntiasse societati intelliguntur."

[2] Dig. Lib. 17, tit. 2, l. 64; Pothier, Pand. Lib. 17, tit. 2, n. 69.

chosen for the purpose was not unseasonable, or injurious to the interests of the other partners; in other words, it was sufficient if the partner renounced for a reasonable cause, and at a reasonable time, and in a reasonable manner. *Si convenerit inter socios, ne intra certum tempus communis res dividatur, non videtur convenisse, ne societate abeatur. Quod tamen, si hoc convenit, ne abeatur; an valeat? Eleganter Pomponius scripsit, frustra hoc convenire, nam etsi non convenit, si tamen intempestive renuncietur societati, esse pro socio actionem. Sed etsi convenit, ne intra certum tempus societate abeatur, et ante tempus renuncietur, potest rationem habere renunciatio; nec tenebitur pro socio, qui ideo renunciavit, quia conditio quædam, qua societas erat coïta, ei non præstatur; aut quid, si ita [injuriosus et] damnosus socius sit, ut non expediat eum pati?* [1]

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[1] Dig. Lib. 17, tit. 2, l. 14; Pothier, Pand. Lib. 17, tit. 2, n. 64 to 68; 1 Story on Eq. Jurisp. § 668. — Domat has summed up the principal doctrines of the Roman law on this subject in the following articles. "(1.) As partnership is formed by consent, so is it in the same manner dissolved; and it is free for the partners to break off their partnership, and to give it over whenever they please, even before the end of the term which it was to have lasted, if they all agree to it. (2.) The tie which is among partners, being founded on the reciprocal choice which they make of one another, and on the hopes of some profit, it is free for every one of the partners to break off partnership whenever he pleases; whether it be because there is no good agreement among the partners, or that some necessary absence, or other affairs, make the partnership burdensome to him who is desirous to leave it; or that he does not like a commerce which the partners are about to undertake; or that he does not find his account in the partnership; or for other reasons. And he may give over partnership without the consent of the other partners, and that even before the time at which it was to have ceased, and although it have been agreed that none of the partners should break off the partnership till the time agreed on were expired. Provided, that the partner does not break off with some sinister view; as if he quits the partnership that he may buy for himself alone, what the whole community had a mind to purchase, or that he may make some other profit to the prejudice of the other partners, by his leaving them; or provided he does not quit after some business is

§ 274. By the old French law, a partnership, which was for an indefinite period, or without any limitation

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begun, or at an unseasonable time, which may occasion some loss or damage to the community. (3.) The partner who breaks off partnership with an unfair design, disengages his copartners from all engagements to him, but does not disengage himself from his obligations to them. Thus, he who should withdraw himself from an universal partnership of their whole estate, present and to come, that he alone might inherit a succession fallen to him, would bear the whole loss if the succession which he alone inherits should prove burdensome; but he would not deprive his copartners of the profit, if the succession should prove advantageous, and they have a mind to share in it. And in general, if a partner breaks off at an unseasonable time, which occasions the loss of some profit to the community, which otherwise it might have made, or which causes any other damage, he will be bound to make it good. As if he quits before the time to which the partnership was to have lasted, abandoning a business with which he was charged. And he who breaks off the partnership in this manner, shall have no share in the profits which shall happen to be made afterwards; but he shall bear his part of what losses shall afterwards happen, in the same manner as he would have been bound to do if he had not quitted the partnership. (4.) The partner who renounces the partnership at an unseasonable time, not only does not free himself from his engagements to his copartners, but is answerable for all the losses and damages which his unseasonable renunciation may have caused to the society. Thus, if a partner quits whilst he is on a journey, or engaged in any other business for the community; or if his quitting obliges the partners to sell any merchandise before the time; he shall be bound to make good the losses and damages which his leaving the partnership under these circumstances shall have occasioned. (5.) In order to judge whether the partner withdraws himself at an unseasonable time, it is necessary to consider what is most profitable for the whole community, and not for any one of the partners in particular. (6.) If, after a fair and lawful renunciation, the partner who has quitted the partnership, begins anew to carry on any commerce from which he reaps some profit, he will not be bound to share it with his former partners. (7.) A fraudulent and unseasonable renunciation is never permitted, whether the contract of partnership has provided against it, or not. For this would be repugnant to fidelity, which being essential to the contract of partnership, is always understood to be comprehended in it. (8.) The renunciation is of no use to the person who has made it, till it be made known to the other partners; and if in the interval after the renunciation, and before it is known to the other partners, he who has renounced makes any

of time, might be dissolved at the mere pleasure of any one of the partners, under two qualifications or restrictions; (1.) that the renunciation should be in good faith; (2.) that it should not be made at an improper time.[1] But partnerships, which by the original contract were to endure for a limited period, were deemed not to be dissoluble, until the expiration of that period, unless some just cause of dissolution should occur.[2] In this latter event, any partner might, upon giving due notice, renounce the partnership. Some of the just causes here referred to were, that such partner was to be long absent in the service of the State; another was some habitual infirmity, which disabled him from performing his duties.[3] The modern Code of France, and that of Louisiana, have adopted the same rules.[4] Substantially the same principles prevail in the Scottish law.[5]

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profit, he will be obliged to share it with his copartners; but if he suffers any loss, it will all fall upon himself. And if in this space of time the other partners reap any gain, he will have no share in it; and if they suffer any loss, he must bear his part of it." Domat, B. 1, tit. 8, § 5, art. 1 to art. 8, by Strahan. See also Mr. Swanston's learned note to Crawshay *v.* Maule, 1 Swanst. R. 509, note (a); Pothier, Pand. Lib. 17, tit. 2, n. 64 to n. 68; 2 Bell, Comm. B. 7, ch. 2, p. 632, 633, 5th edit.; 1 Story on Eq. Jur. § 668.

[1] Pothier, De Societé, n. 149, 150.

[2] Pothier, De Societé, n. 152, 153.

[3] Pothier, De Societé, n. 153, 154. See a like rule in the Roman law. Pothier, Pand. Lib. 17, tit. 2, n. 68.

[4] Code Civil of France, art. 1869, 1870, 1871; Code of Louisiana, (1825), art. 2855 to art. 2859.—The French Civil Code expresses the whole doctrine in the following brief terms. "Dissolution of partnership by the will of one of the parties applies only to partnerships, the duration of which is unlimited, and is effected by a renunciation notified to all the

[5] Ersk. Inst. B. 3, ch. 3, § 26; 2 Bell, Comm. B. 7, ch. 1, p. 532, 533, 5th edit.

§ 275. At the common law, there does not seem to be any such recognized limitation or qualification of the right of renunciation by any one partner, where the partnership is merely at will; for in such cases, any partner, as we have seen, may dissolve it at his pleasure.[1] In cases, where the partnership is by the

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partners, provided such renunciation be *bonâ fide*, and not made at an improper time. Renunciation is not made *bonâ fide*, where the partner renounces in order to appropriate to himself alone the profit, which the partners proposed to have drawn out in common. It is made at an improper time, where the things are no longer entire, and that it is of consequence to the partnership that its dissolution be deferred. Dissolution of partnerships for a term cannot be demanded by one of the partners before the term agreed, unless for just motives; as where another partner fails in his engagements, or that an habitual infirmity renders him unfit for the affairs of the partnership, or other similar cases, the lawfulness and weight of which are left to the arbitration of judges."

[1] Ante, § 269; Marquand *v.* N. York Manufact. Co. 17 Johns. 525.— Mr. Swanston, in his learned note to Crawshay *v.* Maule, 1 Swanst. 509 to 514, says: "The Editor is not apprised of any direct authorities in the English law, on the distinction between seasonable and unseasonable dissolution. But in one instance, the Court of Chancery seems to have assumed jurisdiction to qualify the right of renunciation, by reference to that distinction. 'An application was made some years ago to the Court of Chancery for an injunction to inhibit the defendants from dissolving a commercial partnership; the other side proposed to defer it, as not having had time to answer the affidavits; but it was insisted that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the Court deferred it, the defendants undertaking not to do any thing prejudicial in the mean time. But no doubt arose concerning the general propriety of such an application. Chavany against Van Sommer, in Chancery, M. T. 11, G. 3;' 3 Wooddeson, Lect. 416, note. The register contains the following entry of the original application in this case. Peter Chavany, plaintiff, James Van Sommer, and others, defendants; 14th November, 1771. 'Whereas Mr. Solicitor-General of counsel with the plaintiff, this day moved and offered divers reasons into this Court, that an injunction may issue to restrain the said defendants, James Van Sommer, &c. from dissolving or breaking up the copartnership, now carrying on between the plaintiff and the said defendants, &c.; or from doing any act whatever tending thereto, and also to restrain the said defendants, &c. from selling, or disposing of, or joining in the sale, conveyance, or assignment of the lease-

agreement to endure for a limited period of time, the question, whether it may within the period be dissolved by the mere act or will of one of the partners, without the consent of all the others, does not seem to be absolutely and definitely settled in our jurisprudence, although it would not seem, upon principle, to admit of any real doubt or difficulty. Whenever a stipulation is positively made, that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement, and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend

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hold estate, and interest belonging to the said copartnership, or contracting for the sale thereof, or joining in such contract, in the presence of Mr. John Cocks and Mr. Maddock, of counsel with the defendants, who prayed that the said notice might be saved; whereupon, and, upon hearing what was alleged by the counsel on both sides, it is ordered, that the benefit of the notice of the said motion be saved till the last day of this term, the defendants consenting not to do any thing contrary to what the plaintiff now prays, in the mean time; and it is further ordered, that the defendants do file their affidavits two days before.' Reg. Lib. A. 1771, fol. 6. The benefit of the notice was afterwards saved, till the first general seal ensuing the term (Id. fol. 7), and on the 25th of November, the defendants obtained an order for time to answer. Id. fol. 147. The register has been searched to the end of Trinity term, 1775, without discovering any further trace of this cause. In another case, the Court qualified the obligation to continue a partnership, by reference to the design of the contract; and directing an inquiry whether the business could be carried on according to the true intent and meaning of the articles, expressed a determination to dissolve the partnership, if the Master reported in the negative. Baring *v.* Dix, 1 Cox, 213; 1 Montagu on Partn. p. 90; and in Waters *v.* Taylor, 2 Ves. & Beam. 299, Lord Eldon declared a partnership dissolved by the conduct of the parties, rendering it impossible to conduct the undertaking on the terms stipulated. See Denisart, voce, Societé, s. 12, p. 539." But the right of a Court to decree a dissolution of the partnership is a very different thing from the right of the partner himself to dissolve it *suâ sponte*.

upon the due accomplishment of the adventure or voyage, or the entire time to be required to put the partnership into beneficial operation.[1] It is no answer to say, that such a violation of the engagement may entitle the injured partners to a compensation in damages; for, independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious, that the remedy may be, nay, must be, in many cases utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a Court of Equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *suâ sponte*, from mere caprice, or at his own pleasure, to dissolve the partnership.[2] In short, the opposite doctrine, although perhaps in some measure countenanced by the Roman law, is founded upon reasons exceedingly artificial, if not indefensible. It proceeds upon a ground which cannot be maintained in common sense or justice, that any partner has a right to found his own claim to immediate indemnity and safety upon a known injury to the rights and interests of his copartners, whatever may be the nature or extent thereof.[3]

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[1] Story on Eq. Jurisp. § 668.

[2] See 1 Story on Eq. Jurisp. § 668.

[3] The opinion here maintained has the apparent support of the most respectable elementary writers, and has been either taken for granted, or partially upheld by many eminent Judges. See Gow on Partn. ch. 5, § 1, p. 218, 219, 226, 3d edit.; Collyer on Partn. B. 1, ch. 2, § 2, p. 68, 2d edit.; Watson on Partn. ch. 7, p. 381, 2d edit.; 1 Montagu on Partn. Pt. 3, ch. 1, § 1, p. 90 [113]; 3 Kent, Comm. Lect. 43, p. 61, 4th edit. Lord Eldon in Peacock v. Peacock, 16 Ves. 56, and Crawshay v. Maule, 1 Swanst. R. 495, took it for granted that one partner could not, of his own mere will, dissolve a partnership for a limited period. Mr. Justice Washington asserted the same doctrine in positive terms, in Pierpont v. Graham, 4 Wash. Cir. R.

§ 276. Nor does the Roman law, or the foreign law, founded upon it, in cases of a partnership for a lim-

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234. On that occasion he said: "Now it is perfectly clear, that one partner cannot, by withdrawing himself from the association before the period stipulated between the partners for its continuance, either dissolve the partnership, or extricate himself from the responsibilities of a partner, either in respect to his associates, or to third persons; and if this be so, it would seem that he could not produce the same consequence by any other voluntary act of his own. This is not like those cases where, by the act of God, or by the operation of law, the partnership is dissolved, as by the death or bankruptcy of a partner." The same doctrine seems to have been held in the unreported case of Chavany *v.* Van Sommer, 3 Wooddes. Lect. p. 416, note; 1 Swanst. R. 512, note; Ante, § 275, note. The case of Marquand *v.* The New York Manuf. Co. 17 Johns. R. 525, and the dictum of Mr. Justice Platt, in Skinner *v.* Dayton, 19 Johns. R. 538, are indeed to the contrary. Mr. Chancellor Kent (3 Kent, Comm. Lect. 43, p. 54, 55, 4th edit.; Id. p. 61) has summed up the reasoning on this side of the question, without, however, expressing his own opinion. He says: "But if the partners have formed a partnership by articles, for a definite period, in that case it is said, that it cannot be dissolved without mutual consent before the period arrives. This is the assumed principle of Law by Lord Eldon, in Peacock *v.* Peacock, and in Crawshay *v.* Maule; and yet in Marquand *v.* The New York Manuf. Company, it was held, that the voluntary assignment, by one partner, of all his interest in the concern, dissolved the partnership, though it was stipulated in the articles, that the partnership was to continue until two of the partners should demand a dissolution, and the other partners wished the business to be continued, notwithstanding the assignment. And in Skinner *v.* Dayton, it was held by one of the Judges, that there was no such thing as an indissoluble partnership. It was revocable in its own nature, and each party might, by giving due notice, dissolve the partnership, as to all future capacity of the firm to bind him by contract; and he had the same legal power, even though the parties had covenanted with each other that the partnership should continue for such a period of time. The only consequence of such a revocation of the partnership power, in the intermediate time, would be, that the partner would subject himself to a claim of damages for a breach of the covenant. Such a power would seem to be implied in the capacity of a partner, to interfere and dissent from a purchase or contract about to be made by his associates; and the commentators on the Institutes lay down the principle, as drawn from the civil law, that each partner has a power to dissolve the connection at any time, notwithstanding any convention to the contrary, and that the power results from the nature of the association. They hold every such

ited period of time, properly considered, justify, or allow one partner to dissolve it at his mere pleasure, within that period. On the contrary, as we have seen,[1] it annexes to the exercise of the right a positive condi-

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convention null, and that it is for the public interest, that no partner should be obliged to continue in such a partnership against his will, inasmuch as the community of goods in such a case engenders discord and litigation." He afterwards adds: "In some instances, Chancery will restrain a partner from an unseasonable dissolution of the connection, and on the same principle, that it will interfere to stay waste and prevent an irreparable mischief. And such a power was assumed by Lord Apsley, in 1771, without any question being made as to the fitness of the exercise of it. In the civil law, it was held by the civilians to be a clear point, that an action might be instituted by, or on behalf of, the partnership, if a partner, in a case, in which no provision was made by the articles, should undertake to dissolve the partnership at an unseasonable moment; and they went on the ground, that the good of the association ought to control the convenience of any individual member. But such a power, acting upon the strict legal right of a party, is extremely difficult to define, and I should think rather hazardous and embarrassing in its exercise." Vinnius has stated the general reasoning of the Roman law on this point in the passage already cited, ante, 270, note. But his sole ground is, that otherwise the partnership would be perpetual, which can only apply to a case where there is a covenant for its perpetual duration; and even then it might be dissolved by a court of justice, for a reasonable cause. In the recent case of Bishop *v.* Breckles (1 Hoffm. Ch. R. 534), the Vice-Chancellor (Hoffman) of New York examined all the authorities; and concluded by saying: "The law of the Court, then, requires something more than the mere will of one party to justify a dissolution. But it seems to me, that but little should be demanded. The principle of the civil law is the most wise. Why should this Court compel the continuance of an union, when dissension has marred all prospect of the advantages contemplated at its formation? By refusing to dissolve it, the power of binding each other, and of dealing with the partnership property remains, when all confidence and all combination of effort is at an end. The object of the contract is defeated." In truth, however, the Roman law carries in its own bosom a qualification, which shows that the dissolution must be for a reasonable cause, and under reasonable circumstances; and then it seems most fit for the action of a court of justice, and not for one of the interested parties. Ante, § 273, and note; Pothier, Pand. Lib. 17, tit. 2, n. 64, 65; Pothier, de Société, n. 138, 146, 149, 150, 151, 152.

[1] Ante, 273, 274; Pothier, Pand. Lib. 17, tit. 2, n. 64, 65, 68; 2 Bell, Comm. B. 7, ch. 2, p. 632, 633, 5th edit.

tion, that it shall be for a just cause and under reasonable circumstances. Pothier accordingly says, that in cases of partnership for a fixed period of time, there is an implied understanding, that it shall not be dissolved until the expiration of that period, at least unless some just cause for the dissolution shall have supervened; and, therefore, one partner cannot, without such just cause, dissolve the partnership, to the prejudice of the other partners. He cites the Roman law in support thereof: *Qui in societatem in tempus coit, eam ante tempus renunciando, socium a se, non se a socio liberat;*[1] and he then proceeds to enumerate the particular cases which shall constitute just causes of dissolution. Moreover, this important qualification is annexed by the Roman law to the right of renunciation, that it is limited to cases where it is for the benefit, not of the particular partner, but of the partnership itself, that it should be dissolved; otherwise it is deemed unseasonable. *Hoc ita verum esse, si societatis intersit non dirimi societatem, semper enim, non id quod privatim interest unius ex sociis, servari solet, sed quod societate expedit.*[2] So that, in effect, the whole difference in this view between the Roman and foreign law, and the common law, resolves itself into this, that in the former the partner may, by his own act, primarily insist upon a dissolution, which, however, is not valid, unless it be for a just cause, and is affirmed to be so by a Court of Justice;[3] whereas the common law does not allow the dissolution to be complete or effective, until a Court of Justice has itself decreed the dissolution for a just

[1] Pothier, de Societé, n. 152; Dig. Lib. 17, tit. 2, l. 65, § 6; Pothier, Pand. Lib. 17, tit. 2, n. 64, 65; Ante, § 273, note.

[2] Dig. Lib. 17, tit. 2, l. 65, § 5; Pothier, Pand. Lib. 17, tit. 2, n. 65; Domat, B. 1, tit. 8, § 5, art. 4, 5.

[3] Pothier, de Societé, n. 154.

cause. In substance, therefore, the rule is the same in both laws; although it is varied in its actual application. The rule of the common law is, to say the least of it, quite as convenient as that of the Roman and foreign law, if, indeed, it be not more appropriate, and just, and equitable, than that of the latter.

§ 277. The question sometimes occurs, whether a partnership, under all the circumstances of the case, is properly to be treated as a partnership at will, or as a partnership for a limited period. It is by no means necessary, that there should be an express stipulation either way; for its intended duration may often be ascertained by implications or presumptions, arising from the acts and conduct of the parties, and other accompanying circumstances. In the absence, however, of all acts or circumstances, which clearly rebut and control the inference, the conclusion of law is, that the partnership is intended to be at the mere will and pleasure of the parties. But acts and circumstances may greatly qualify or even overturn this conclusion. Thus, the question has arisen, whether the purchase or lease of certain premises, for carrying on the trade or business of the partnership for a limited term of years, did, of itself, amount to presumptive proof, that there was an implied agreement between the partners, that the duration of the partnership should be coextensive with the term of the purchase or lease. It has been held, that it did not; for, it was not of itself decisive any way: but was readily reconcilable with the notion, that it was purchased for the mere accommodation of the trade or business, while it should endure, and then to be sold as part of the partnership effects; and so it was not intended in any manner to indicate the period of its duration. Upon any other ground of reasoning, if the

purchase was of an estate in fee-simple, it might be contended, that the partnership was to continue forever, which would be a wholly inadmissible doctrine.[1]

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[1] See Marshall v. Marshall, cited 2 Bell, Comm. B. 7, ch. 1, p. 633, note 3; Crawshay v. Maule, 1 Swanst. R. 495, 508, 521. In this last case, Lord Eldon said: "The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved, to this extent, that the Court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So death terminates a partnership, and notice is no more than notice of the fact that death has terminated it. Without doubt, in the absence of express, there may be an implied contract, as to the duration of a partnership. But I must contradict all authority, if I say, that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the Court holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase a fee-simple there shall be a partnership for ever. It has been repeatedly decided, that interests in lands, purchased for the purpose of carrying on trade, are no more than stock in trade. I remember a case in the House of Lords, about three years ago (the case of the Carron Company), in which the question was much discussed, whether, when partners purchase freehold estate for the purpose of trade, on dissolution, that estate must not be considered as personalty, with regard to the representatives of a deceased partner." Again, he added: "It has also been insisted, that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interest, as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that there is no general rule, that partners, purchasing a leasehold interest, must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and as part of the stock may be sold; nor would it be material, that the estate purchased by a partnership was freehold, if intended only as an article of stock; though a question might, in that case, arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality. It is impossible, therefore, in my opinion, to hold that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases, or of the

§ 278. In the next place, a partnership may expire by the mere efflux of the time, which limits and bounds its duration under the terms of the original contract, by which it is created. This is the natural, nay, the necessary, result of the very design and terms of the contract; for the same consent, which originated, terminates it; and the consent cannot be presumed to exist beyond the fixed period, since the presumption would be directly contradictory to the actual limitation. Hence, if in fact continued, it must be continued by a new agreement, and not under the old one.[1] So Pothier lays down the rule. *Lorsque la société a été contractée pour un certain temps limité, elle finit de plein droit par l'expiration de ce temps.*[2] And he adds, that the prolongation of it beyond that period must be proved by some act in writing, clothed with the proper formalities, which were required by law in its original formation.[3]

§ 279. But the question may arise at the common law, when a partnership is actually continued by the parties after the expiration of the original term, prescribed for its duration, what is to be deemed the true effect and interpretation of the act? Is it to be treated as a continuation of the partnership, upon all the original terms thereof, and for a like period? Or, is it to be deemed a mere continuation of the partnership, during the will of the parties? The question does not,

longest lease." See also 2 Bell, Comm. B. 7, ch. 2, p. 633, 5th edit.; Collyer on Partn. B. 1, ch. 2, § 1, p. 68, 69, 2d edit.; Gow on Partn. ch. 5, § 1, p. 225, 3d edit.

[1] 2 Bell, Comm. B. 7, ch. 2, p. 631, 5th edit.; Id. ch. 3, p. 649 to 655; U. S. Bank *v.* Binney, 5 Mason, R. 176, 185; 3 Kent, Comm. Lect. 43, p. 53, 4th edit.

[2] Pothier, de Société, n. 139; Code Civil of France, art. 1865, 1866; Code of Louisiana, 1825, art. 2848, 2849.

[3] Ibid.

perhaps, admit of any uniform or universal answer. It may be affected by various considerations; by the acts of the parties; by the habits and changes of their business; by implications from their omission to act upon certain terms of the original contract, and from apparent qualification and exceptions and restrictions of others, in their dealings and settlements with each other, or even with third persons. But, in the absence of all acts and circumstances whatsoever, to control or vary the original terms of the agreement, the just legal conclusion seems to be, that the partnership is to be treated as a mere partnership during the joint will and pleasure of all the parties, and, therefore, dissoluble at the will of any one of them; but that in all other respects it is to be carried on upon the original terms thereof, as to rights, duties, interests, liabilities, and shares of the profits and losses.[1]

[1] See Featherstonhaugh *v.* Fenwick, 17 Ves. 299; U. S. Bank *v.* Binney, 5 Mason, R. 176, 185; 2 Bell, Comm. B. 7, ch. 2, p. 632, 633, 5th edit.; Gow on Partn. ch. 5, § 1, p. 224, 225, 3d edit.; Mifflin *v.* Smith, 17 Serg. & Rawle, 165. — Sir Wm. Grant (Master of the Rolls) in the case of Featherstonhaugh *v.* Fenwick, 17 Ves. 299, 307, discussed the subject somewhat at large; and how far presumptions might arise from circumstances, as to the terms on which the partnership was to be deemed continued, he said: "The first question in this cause is, whether the partnership was dissolved on the 22d of November, 1804. The plaintiff contends that the defendants had no right to put an end to the partnership at that period; and that is contended on several grounds; first, that as by the articles which formerly existed, but had expired, twelve months' notice was necessary to enable a partner to withdraw, the same notice was necessary for withdrawing from the partnership, which continued without articles. I do not agree to that proposition. The latter partnership was for an indefinite period, and therefore might be dissolved at the will of the parties; subject to the question, afterwards made, by what notice that will must be declared. Another ground on which the plaintiff contends against the dissolution on the 22d of November, is, that the lease of the premises in London, used in carrying on the concern, was then unexpired. That does not oppose any obstacle to the dissolution; as it is not a necessary consequence, that partners, taking premises for the use of

§ 280. In the next place, a partnership may expire by its own express or implied limitation, whenever the

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their trade for a definite period, contract a partnership for the same period. If any part of the term is unexpired at the end of the partnership, that is partnership property, and is to be distributed as such; but I do not apprehend that they are bound to continue the partnership on that account. A third ground is, that there were several contracts subsisting with their workmen, which had a considerable period of time to run. That argument goes considerably too far. It would go to this extent, that a partnership could not be dissolved, until all their contracts were completely ended and wound up; and that can hardly be the case at any period, as persons are entering into contracts from day to day, which cannot all expire at the same period. It would on that ground be hardly possible to dissolve any partnership, as there must always be contracts depending. I do not conceive, therefore, that the existence of engagements with third persons, either for goods to be worked up, or engagements with their workmen, which had not come to a conclusion, can form an objection to the dissolution. The partners cannot, it is true, by a dissolution, relieve themselves from the performance of any engagements, which they may have contracted with third persons; but, as among themselves, the existence of such engagements cannot prevent a dissolution, either by mutual consent or by notice. The question then is, what sort of notice ought to be given for this purpose? Until a very recent period, it had been, I believe, understood, that a reasonable notice should be given; but upon the question, what is reasonable notice, much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say, that a partnership shall be dissolved on a given day; on the other, it must be extremely difficult for a Court of Equity, by a general rule, to ascertain what is reasonable notice; and the question, whether the particular notice was reasonable or convenient, would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of that sort, I believe, have led to a different rule; that in the case of a partnership, such as this, subsisting without articles, and for an indefinite period, any partner may say, 'It is my pleasure on this day to dissolve the partnership.' But, considering the principles on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern; as, where the articles do not prescribe the terms, the law ascertains what shall be the consequence of dissolution; viz., that the whole of the joint property must be sold off, and the whole concern wound up. No partner, therefore, can derive a particular advantage by choosing an unseasonable moment for dissolution; as, upon the principles established in Crawshay *v.* Collins, and the authorities there referred to, he must suffer in proportion to the extent of his interest in the trade. I hold, therefore, that the dissolution

event has occurred, which the parties naturally or necessarily contemplated as its just termination.[1] This may arise in two ways; (1.) by the extinction of the thing, which constituted the sole subject-matter of the partnership; (2.) by the completion or accomplishment of the entire business, for which the partnership was formed.[2] An example of the first kind may easily be suggested by a case, where two persons (not being otherwise partners) should jointly buy a ship, to be employed by them

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of this partnership took place on the 22d of November." In United States Bank *v.* Binney, 5 Mason, R. 176, 185, the Court said: "Those articles (of partnership) expired by their own limitation in two years, and had force no longer, unless the parties elected to continue the partnership on the same terms. That is matter of evidence upon the whole facts. The natural presumption is, that, as the partnership was continued in fact, it was construed upon the same terms as before, unless that presumption is rebutted by the other circumstances in the case. There is no written agreement respecting the extension of the partnership, and therefore it is open for inquiry upon all the evidence."

[1] 3 Kent, Comm. Lect. 43, p. 52, 53, 4th edit.

[2] 3 Kent, Comm. Lect. 43, p. 53, 4th edit.; Fellows *v.* Wyman, 33 N. H. R. 356; Griswold *v.* Waddington, 16 Johns. R. 491.— On this occasion Mr. Chancellor Kent, in his most masterly judgment, used upon this point the following language. "Pothier, in his treatise on Partnership, says, that every partnership is dissolved by the extinction of the business for which it was formed. This he illustrates, in his usual manner, by a number of easy and familiar examples. Thus, if a partnership be formed between two or more persons, for bringing together, and selling on joint account, the produce of their farms, or of their live-stock, and the produce of the stock of one of them should happen to fail or be destroyed, the partnership ceases, of course; for there can be no longer any partnership, when one has nothing to contribute. So, if two persons form a partnership in a particular business, and the one engages to furnish capital, or the raw materials, and the other his skill and labor, and the latter becomes disabled by the palsy, the partnership is extinguished, because the object of the partnership cannot be fulfilled. So, again, if two or more persons form a partnership to buy and sell goods at a particular place, the partnership is dissolved, whenever the business is terminated. Pothier, Trait. du Cont. de Soc. No. 140-143. Extincto subjecto, tollitur adjunctum, is the observation of Huberus, when speaking on this very point." Duvergier, Droit Civil Franç. Tom. 5, § 418 to 428.

for their joint and mutual profit as partners; and the ship should afterwards be totally lost or destroyed. That would constitute a complete termination of the partnership, not merely by operation of law (although that ground might be fairly maintainable), but as an exact exposition of the actual intendment and understanding of the parties.[1] An example of the second kind is readily found in the common case of a joint enterprise, voyage, adventure, or other commercial speculation, for the joint account and mutual profit of the parties concerned therein. Thus, for example, if two persons (not being otherwise partners) should hire a ship for a particular voyage, upon their joint account and for their mutual profit, and the voyage should be undertaken and completed, and the business thereof closed; the partnership so formed would be dissolved by the mere lapse of time, and the occurrence of the event, by which it was originally intended by the parties that it should terminate.[2] The same doctrine would apply to the case of a joint shipment of goods, upon the joint account and for the mutual profit of the shippers on a foreign voyage; or a joint purchase of goods, to be sold for the joint benefit and profit of the purchasers

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[1] See Pothier, de Societé, n. 140, 141.—The Civil Code of France (art. 1867) declares: "Where one of the partners has promised to put in common the ownership of a thing, the loss of it, happened before the bringing in can be effected, operates a dissolution of the partnership in relation to all the partners. Partnership is in like manner dissolved in all cases by the loss of the thing, where the enjoyment alone has been put in common, and the ownership remains in the hands of the partner. But the partnership is not broken up by the loss of a thing, the ownership of which has already been brought into the partnership."

[2] Ante, § 27, 30, 55, 267; Post v. Kimberley, 9 Johns. R. 470; Gow on Partn. ch. 5, § 1, p. 218, 3d edit.; Watson on Partn. ch. 7, p. 379, 2d edit.; Voet ad Pand. Lib. 17, tit. 2, § 26, Tom. 1, p. 761; Duvergier, Droit Civ. Franç. Tom. 5, tit, 9, § 411 to 420.

thereof; or a joint undertaking by mechanics, to perform work and labor, and find materials, to erect a dwelling-house for a third person, upon their joint account and for their mutual profit. For, in all such cases, the completion of the voyage, or adventure, or undertaking, or commercial speculation, naturally terminates the partnership contemplated by the parties.[1]

§ 281. The same doctrine was formally promulgated in the Roman law; and has been incorporated into the jurisprudence of all modern commercial nations, as indeed it might naturally be presumed to be, since it is founded in common sense, and a just interpretation of the intention of the parties. Thus, in the Roman law it is said (as we have already seen),[2] *Solvitur societas ex personis, ex rebus, ex voluntate, ex actione. Ideoque sive homines, sive res, sive actio interierit, distrahi videtur societas.*[3] *Res vero intereunt, cum aut nullæ relinquantur, aut conditionem mutaverint, neque enim ejus rei, quæ jam nulla sit, quisquam socius est; neque ejus, quæ consecrata publicatave sit.*[4] And again: *Item; si alicujus rei contracta societas sit, et finis negotio impositus est, finitur societas.*[5] Pothier, Vinnius, and other learned jurists, have done little more than to state the same doctrine, with a few appropriate illustrations.[6]

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[1] Ante, § 27, 30, 55, 267; Cumpston *v.* McNair, 1 Wend. R. 457; Pothier, de Société, n. 143; Collyer on Partn. B. 1, ch. 1, § 1, p. 32, 2d edit.; Watson on Partn. ch. 7, p. 379, 2d edit.; Voet ad Pand. Lib. 17, tit. 2, § 26, Tom. 1, p. 761; Duvergier, Droit Civil Franç. Tom. 5, § 431.

[2] Ante, § 266.

[3] Pothier, Pand. Lib. 17, tit. 2, n. 54; Dig. Lib. 17, tit. 2, l. 63, § 10; Domat, B. 1, tit. 8, § 5, art. 11.

[4] Dig. Lib. 17, tit. 2, l. 63, § 10; Pothier, Pand. Lib. 17, tit. 2, n. 62.

[5] Inst. Lib. 3, tit. 26, § 6; Dig. Lib. 17, tit. 2, l. 65, § 10; Pothier, Pand. Lib. 17, tit. 2, n. 63; Domat, B. 1, tit. 8, § 5, art. 11.

[6] Pothier, de Société, n. 140 to 143; Vinnius, ad Inst. Lib. 3, tit. 26, § 6,

§ 282. In the next place, as to the cases of dissolution by the decree of a Court of Equity.[1] It is obvious, from what has been already stated, that although a partnership may, by the original agreement, be formed for a stipulated period, and on that account may not be dissoluble at the mere will of either of the partners, without the concurrence of all the others; [2] yet, that various cases may occur, in which it may become the duty of a judicial tribunal, either to declare the original partnership null and void *ab initio*, or to annul it in respect to all future operations; otherwise the grossest injustice and most mischievous consequences might occur to some of the partners, without any fault or impropriety on their own part. Indeed, the remedial authority of a judicial tribunal, in order to be adequate and complete, ought not to stop here; for many cases of unforeseen accident, or unsuspected mischief, may occur, which may make the further prosecution of the business of the partnership injurious, or improper, without the fault of any partner, and, indeed, where all of them are equally innocent. The Prætor's Forum at Rome seems ordinarily to have exercised, or at least to have superintended the exercise of this

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Comm.; Johnston's Civil Law of Spain, B. 2, tit. 15, p. 232; Van Leeuwen's Comm. B. 4, ch. 23, § 11, p. 415; Moreau & Carlt. Partidas 5, tit. 10, l. 10, vol. 2, p. 773; Code Civil of France, art. 1865; Code of Louisiana (1825), art. 2847; Griswold *v.* Waddington, 16 Johns. R. 491, 492, per Mr. Chancellor Kent. Vinnius puts the doctrine in brief but very clear terms. "Si societas certæ alicujus negotiationis causâ inita sit, puta vini aut frumenti ad certam quantitatem emendi vendendique, sine negotio imposito, id est, empto distractoque vino aut frumento, societas extinguitur. Sed in eo nihil proprium videtur societatis; ut pote cui ea lex ab initio dicta sit. Idem est, si ad certum tempus contracta sit societas; nam, exacto tempore, ea expirat."

[1] 3 Kent, Comm. Lect. 43, p. 60, 4th edit.

[2] Ante, § 273, 276.

authority, by controlling or confirming the acts of the partners, as to the right of dissolution, as the particular case required its interposition; and thus to have administered the appropriate relief. The Roman law (and the modern continental law has in a great measure followed it) authorized, as we have seen, any partner to renounce such a partnership for any just and reasonable cause. But then the sufficiency of that cause was ultimately a matter for the decision of the proper judicial tribunal; and until that decision was had, his act could be deemed nothing more than a preliminary step, or conditional assertion of the right of dissolution.[1]

§ 283. The Roman law also treated it as a clear case of dissolution, where action was brought by one partner against the others, for an account of the partnership business, and a judgment passed accordingly. (*Societas*) *actione distrahitur, cum aut stipulatione aut judicio mutata sit causa societatis. Proculus enim, ait, hoc ipso, quod judicium ideo dictatum est, ut societas distrahitur, renunciatam societatem, sive totorum bonorum, sive unius rei societas coïta sit.*[2]

§ 284. In England and America no jurisdiction whatever exists, to decree a dissolution of a partnership, for any cause whatsoever, in the Courts of Common Law. It is confided exclusively to Courts of Equity; and, indeed, as in many cases it must be a matter resting in the sound discretion of the Court, it seems most fit and proper to appropriate the jurisdiction to those tribunals which constantly exercise a

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[1] Ante, § 273, 274, 276; Pothier, de Societé, n. 154; Civil Code of France, art. 1871; Pothier, Pand. Lib. 17, tit. 2, n. 70.

[2] Dig. Lib. 17, tit. 2, § 65; Pothier, Pand. Lib. 17, tit. 2, n. 70.

very large discretion in matters *ex æquo et bono*.[1] This was precisely the case in suits in the Prætor's Forum; and for the most part it now also belongs to the higher tribunals of the different nations of continental Europe, where the strict distinction between law and equity, so well recognized in our municipal jurisprudence, is either unknown, or is repudiated. The principal distinctions as to the exercise of this jurisdiction between our Courts of Equity and the tribunals of continental Europe, seem to be these. In the first place, in the latter tribunals, it is competent for one partner, in any case and at any time, to renounce the partnership *sub modo*, although not absolutely for any reasonable cause, which afterwards shall be sanctioned and approved by the proper tribunal; whereas, in our law (as has been already suggested),[2] a previous decree of the Court is necessary, however reasonable the cause may be.[3] In the next place, in the Roman law and in the modern foreign law, certain causes are deemed *ipso facto* to amount to an actual dissolution; whereas, in our law, they furnish proper grounds only for a decree of dissolution. This will become more apparent in the subsequent pages.

§ 285. The jurisdiction exercised by our Courts of Equity, to decree a dissolution of the partnership, during the term for which it was originally entered into, is of a most extensive and beneficial nature, and has the strongest tendency to prevent irremediable

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[1] 1 Story on Eq. Jurisp. § 673; 3 Kent, Comm. Lect. 43, p. 60, 4th edit.

[2] Ante, § 273, 274, 276.

[3] Gow on Partn. ch. 5, § 1, p. 221, 3d edit.

injuries, and often utter ruin to some of the partners. It may be exercised, as has been already suggested, in the first place, to declare partnerships utterly void *ab initio;* and, in the next place, to decree a dissolution from the time of the decree.[1] The former remedial justice is usually applied to cases where there was fraud, imposition, misrepresentation, or oppression in the original agreement for the partnership.[2] The latter may arise in very different classes of cases, and be affected by very different considerations.

§ 286. Let us then proceed to the examination, in their order, of the various causes for which a Court of Equity will, or at least may, decree a dissolution of a partnership which was unobjectionable in its origin. They may be distributed under two general heads; (1.) Causes arising subsequently to the formation of the contract, founded upon the alleged misconduct, or fraud, or violation of duty of one partner; (2.) Causes arising subsequently to the formation of the contract, where no blame, laches, or impropriety of conduct, necessarily attaches to any of the partners.

§ 287. Under the first head, that of the misconduct, fraud, or violation of duty by a partner, it is proper to observe, that it is not for every trivial departure from duty, or violation of the articles of partnership, or for every trifling fault or misconduct, that Courts of Equity will interfere and decree a dissolution. Thus, for example, Courts of Equity will not interfere in cases

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[1] Ante, § 282.

[2] Ante, § 6; 1 Story, Eq. Jurisp. § 222, 240; Collyer on Partn. B. 2, ch. 3, § 7, p. 244, 2d edit.; Gow on Partn. ch. 3, § 1, p. 107, 3d edit.; Hynes *v.* Stewart, 10 B. Monr. 429. See Lord Eldon's remarks in Tattersall *v.* Groote, 2 Bos. & Pull. 131, 135; Colt *v.* Wollaston, 2 P. Will. 154; Green *v.* Barrett, 1 Sim. R. 45.

of mere defects of temper, casual disputes, differences of opinion, and other minor grievances, which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights, interests, and operations of the partnership.[1]

§ 288. On the other hand, if a case of gross misconduct, or abuse of authority, or gross want of good faith or diligence, such as is and must continue to be productive of serious and permanent injury to the success and prosperity of the business of the partnership, or such as renders it impracticable to be carried on, or

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[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 131, 2d edit.; Id. B. 2, ch. 3, § 3, p. 193, 196; Goodman v. Whitcomb, 1 Jac. & Walk. 569, 572; Wray v. Hutchinson, 2 Mylne & Keen, 255; 1 Story on Eq. Jurisp. § 673; Gow on Partn. ch. 3, § 1, p. 114, 3d edit.—In Goodman v. Whitcomb (1 Jac. & Walk. R. 569, 572, 573), Lord Eldon said: "It may be a question whether the Court will not restrain a partner, if he has acted improperly, from doing certain acts in future. But if what he has done does not give the other party a right to have a dissolution of the partnership, what right has the Court to appoint a receiver, and make itself the manager of every trade in the kingdom? Where partners differ, as they sometimes do, when they enter into another kind of partnership, they should recollect that they enter into it for better and worse, and this Court has no jurisdiction to make a separation between them, because one is more sullen, or less good-tempered than the other. Another Court, in the partnership to which I have alluded, cannot, nor can this Court, in this kind of partnership, interfere, unless there is a cause of separation, which in the one case must amount to downright cruelty, and in the other, must be conduct amounting to an entire exclusion of the partner from his interest in the partnership. Whether a dissolution may ultimately be decreed, I will not say; but trifling circumstances of conduct are not sufficient to authorize the Court to award a dissolution. It is said, that the plaintiff has made larger advances of capital than he was bound to do, and has received none of the profits. But that is no ground for a dissolution. It is then stated that the defendant has exchanged carpets for household furniture. That may perhaps be an improper act; but still there may be a thousand reasons why the Court should not do more than restrain him in future from so doing, and more particularly when he states in his answer that he did it because he thought it the best thing that could be done."

as is positively ruinous to its interests, Courts of Equity will promptly interfere, and decree a dissolution.[1] Habitual intoxication, gross extravagance, and gross negligence, and rash and reckless speculation, in the conduct of the business of the partnership, would probably lead the Court to a like result.[2] To justify such an extraordinary interposition, however, the Court always expects a strong and clear case to be made out of positive or meditated abuse.[3] It is not sufficient to show, that there is a temptation to such misconduct, abuse, or ill faith; but there must be an unequivocal demonstration, by overt acts, or gross departures from duty, that the danger is imminent, or the injury already accomplished.[4] For minor misconduct and grievances, if they require any redress, the Court ordinarily will go no further than to act upon the faulty party by way of injunction.[5]

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[1] 1 Story on Eq. Jurisp. § 673; Collyer on Partn. B. 2, ch. 3, § 3, p. 195, 196, 2d edit.; Goodman *v.* Whitcomb, 1 Jac. & Walk. 569, 572, 673; Chapman *v.* Beach, 1 Jac. & Walk. 574, note; Waters *v.* Taylor, 2 Ves. & Beam. 299; Loscombe *v.* Russell, 4 Sim. R. 8; 3 Kent, Comm. Lect. 43, p. 60, 61, 4th edit.; Gratz *v.* Bayard, 11 Serg. & Rawle, R. 41, 48, per Ch. Just. Tilghman; 1 Montagu on Partn. Pt. 3, ch. 1, p. 112; Liardet *v.* Adams, cited in Waters *v.* Taylor, 2 Ves. & Beam. R. 300, 304, and in 1 Montagu on Partn. Pt. 3, ch. 1, p. 99, and in Gow on Partn. ch. 5, § 1, p. 227, 3d edit.; Gow on Partn. ch. 3, § 1, p. 111 to 115, 3d edit.; Fogg *v.* Johnston, 27 Ala. 432. See also Littlewood *v.* Caldwell, 11 Price, R. 97, 99; Watson on Partn. ch. 7, p. 381, 382, 2d edit.; Smith *v.* Jeyes, 4 Beavan, R. 503.

[2] Ibid; 2 Bell, Comm. B. 7, ch. 2, p. 634, 635, 5th edit.

[3] See Smith *v.* Mules, 10 Eng. Law & Eq. R. 103.

[4] 2 Bell, Comm. B. 7, ch. 2, p. 634, 635, 5th edit.; Glassington *v.* Thwaites, 1 Sim. & Stu. 124; Smith *v.* Jeyes, 4 Beavan, R. 503.

[5] Ante, § 224 to 228, 287; Marshall *v.* Colman, 2 Jac. & Walk. 266; Goodman *v.* Whitcomb, 1 Jac. & Walk. 566, 572, 573; Charlton *v.* Poulter, 19 Ves. 148, note (*c*); Gow on Partn. ch. 3, § 1, p. 111 to 115, 3d edit. — Mr. Collyer has summed up the whole doctrine on this subject in the following terms: "Lord Thurlow once said, that as to misbehavior in one of the partners, he did not see what line could possibly be drawn, and what degree

§ 289. The like doctrine is promulgated in the Roman law; which permits any partner, at his election, to re-

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of misconduct was to be held a sufficient ground for dissolving the partnership. Liardet *v.* Adams, 1 Mont. Partn. 112. And certainly, a Court of Equity will not dissolve a partnership on slight grounds; as, for instance, because one partner may have conducted himself towards the other in an overbearing and insulting manner. 'The Court,' to use Lord Eldon's expressions before adverted to, 'having no jurisdiction to make a separation between them, because one is more sullen or less good-tempered than the other.' Goodman *v.* Whitcomb, 1 Jac. & W. 592. See Wray *v.* Hutchinson, 2 Mylne & Keen, 235; Blake *v.* Dorgan, 1 Iowa, 537. So, again, want of prudence or ability on the part of the person seeking relief, is no just ground for a dissolution; as, where he has made larger advances of capital than he is bound to do, and has received none of the profits. Goodman *v.* Whitcomb, *supra.* However, it may with safety be laid down, that not only wilful acts of fraud and bad faith, but gross instances of carelessness and waste in the administration of the partnership, as well as exclusion of the other partners from their just share of their management, so as to prevent the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract by a Court of Equity. See Marshall *v.* Colman, 2 Jac. & W. 200; Goodman *v.* Whitcomb, 1 Jac. & W. 592; Chapman *v.* Beach, Id. 594; Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, 2 Ves. & B. 304. So also it seems clear, that a habit on the part of one partner of receiving moneys, and not entering the receipts in the books, or not leaving the books open to the inspection of the other partners, whether such conduct arises from a fraudulent intent or not, is good ground for a dissolution. Goodman *v.* Whitcomb, 1 Jac. & W. 593. So if a partner in a banking-house allows a customer to overdraw, and, by way of security, takes bonds from the customer, executed to himself separately and not to the firm, this is such misconduct as will warrant a Court of Equity in decreeing a dissolution. Master *v.* Kirton, 3 Ves. 74; R. L. 1796, B. 428. And although this relief will not be administered for mere defects of temper in some of the parties, yet violent and lasting dissension seems to be a ground upon which a Court of Equity will decree a dissolution; as where the parties refuse to meet each other upon matters of business, a state of things which precludes the possibility of the partnership affairs being conducted with advantage. De Berenger *v.* Hammell, 7 Jarm. Conv. p. 26. And it has been laid down, that though the Court stands neuter with respect to occasional breaches of agreements between partners, which are not so grievous as to make it impossible for the partnership to continue; yet when it finds that the acts complained of are of such a character, that relief cannot be given to the parties except by a dissolution, the Court will decree a dissolution, though it is not specifically asked. Per Sir L. Shadwell, 4 Sim. 11." See also the language

nounce the partnership, whenever the objects of the partnership are no longer attainable, or the misconduct of the other partner is so seriously injurious or mischievous to the partnership, that it ought not to be tolerated. *Et ante tempus renuncietur, potest rationem habere renunciatio. Nec tenebitur pro socio, qui ideo renuntiavit, quia conditio quædam, quâ societas erat coïta, ei non præstatur, aut quid, si ita injuriosus aut damnosus socius sit, ut non expediat eum pati.*[1] Such also is the French law.[2]

*§ 290. Let us now proceed to the other head, embracing the decree of a dissolution of the partnership for causes independent of any blame, laches, or impropriety of conduct, necessarily attached to any of the partners. And here, in the first place, it will be a sufficient ground to decree a dissolution, that there exists an impracticability in carrying on the undertaking for which the partnership was formed.[3] This may take place, either from the inability of one or all of the partners from carrying into effect the terms of the original contract; or from the undertaking itself being in its character visionary, or its operations absolutely impracticable. The case of an Opera House, where the conduct of the parties rendered it impossible to carry it on upon the terms originally stipulated, may serve to illustrate the former part of the position.[4] The latter part of the

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of Mr. Chancellor Kent on the same subject, 3 Kent, Comm. Lect. 43, p. 60, 61, 4th edit.; Gow on Partn. ch. 5, § 1, p. 227, 3d edit.

[1] Dig. Lib. 17, tit. 2, l. 14; Pothier, Pand. Lib. 17, tit. 2, n. 68.

[2] See Duvergier, Droit Civil Franc. Tom. 5, § 447 to 452.

[3] Collyer on Partn. B. 2, ch. 3, § 3, p. 199, 200, 2d edit.; Gow on Partn. ch. 5, § 1, p. 226, 227, 3d edit.

[4] Waters *v.* Taylor, 2 Ves. & Beam. 299; Griswold *v.* Waddington, 16 Johns. R. 438, 491; Duvergier, Droit Civil Franc. Tom. 5, § 420 to 428; Id. § 446 to 449. — In Waters *v.* Taylor, Lord Eldon said: "The real question here is quite different from Adams *v.* Liardet; which I take to be that in

position may be readily illustrated in the not infrequent case, where the partnership is to work a mine, which turns out to be wholly unproductive, and ruinous in its expenses; or for the introduction of a supposed newly invented machinery or manufacture, which proves to be

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which Lord Thurlow's opinion was expressed. This question is, whether from the acts of Taylor himself, it is not manifest, that this partnership cannot be carried on upon the terms for which the parties engaged; whether a single act has been done by him of late, that is not evidence on his part, that he can no longer himself be bound by his contract, so as to observe the terms of it; when he excludes himself from the concern and the partnership, as far as it is to be conducted upon the terms on which it was formed, and says he will carry it on upon other terms. Taking that to be his conduct, this comes to the common case of one partner excluding the other from the concern; as if one will not, because he cannot, continue it upon the terms on which it was formed, the consequence must be, that he says his partner shall not, because he cannot, carry it on upon those terms. That is the true amount of this case. The one cannot engage a performer without the other's consent; having entered into stipulations only with reference to agreement, they have given me no means of extricating them from the difficulties arising from non-agreement. Suppose an opera at this time requires more than £300 per week, or a new exhibition more than £500, if the plaintiff differs upon that, what is a Judge to do but to look at the contract, as the only thing the Court can act upon? and if both parties agree that the contract cannot be acted on, that furnishes the means of saying, there is an end of it; and their interests are to be regarded as if no such contract had existed. The parties, by consent, determine that there is an end of the concern, which cannot be carried on upon the terms stipulated; and the Court cannot substitute another contract." Mr. Chancellor Kent, in Griswold *v.* Waddington (16 Johns. R. 491), said: "In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties, which disables him to perform his part of the duty, as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. Inst. 3, 26, § 7, 8; Vinnius, h. t. 3, 26, 4; Huberus in Inst. Lib. 3, tit. 26, § 6; Dig. 17, 2, 65; Pothier, Cont. de Soc. n. 147, 148; Code Civil, No. 1865; Dict. du Dig. par Thevenot Dessaules, Art. Societé, No. 56. The English law of partnership is derived from the same source; and as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved."

a mere delusion, or incapable of being put into successful operation; or for any other scheme of trade or operation, which is a mere bubble, or wild speculation, or is founded in fundamental errors.[1]

§ 291. In the next place, a partnership may be dissolved by the decree of a Court of Equity, on account of the inability or incapacity of one partner to perform his obligations and duties, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership. This inability or incapacity may arise in various ways; and whenever its direct tendency is either necessarily to frustrate, or essentially to obstruct, or diminish, the objects of the partnership, it would seem clear upon principle, that it ought to furnish a complete ground for a dissolution by a court of justice; for the further continuance of the partnership must be productive of serious inconvenience and injury to the other partners, and may end in their irremediable ruin, or the utter prostration of the enterprise.[2]

§ 292. Hence, if one of the terms of the partnership be, that the whole or a large portion of the capital stock shall be furnished by one partner, and skill and diligence are mainly relied on in the other, as the active partner; and after the partnership is actually commenced, the partner who is to furnish the capital,

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[1] 3 Kent, Comm. Lect. 43, p. 60, 4th edit.; Baring *v.* Dix, 1 Cox, R. 213; Pierce *v.* Piper, 17 Ves. 1, and Buckley *v.* Cater, referred to in 17 Ves. 11, 15, 16, and in Beamont *v.* Meredith, 3 Ves. & Beames, 180, 181; Reeve *v.* Parkins, 2 Jac. & Walk. 390; Collyer on Partn. B. 2, ch. 3, § 3, p. 193, 2d edit.; Barr *v.* Spiers, cited in 2 Bell, Comm. 633, note (2), 5th edit.; Gow on Partn. ch. 5, § 1, p. 227, 3d edit.

[2] 3 Kent, Comm. Lect. 43, p. 62, 4th edit.; Gow on Partn. ch. 5, § 1, p. 221, 3d edit.; Duvergier, Droit Civil Franc. Tom. 5, § 446 to 450.

should by misfortune become wholly unable to furnish it, or if the other partner who is to furnish the skill and diligence, should be seized with a palsy, or any other disease, which should permanently incapacitate him from performing the required duties, such circumstances would seem to present a fit case for the interposition of a Court of Equity to dissolve the partnership.[1]

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[1] 3 Kent, Comm. Lect. 43, p. 62, 4th edit.; Domat, B. 1, tit. 8, § 5, art. 12; 2 Bell, Comm. B. 7, ch. 2, p. 634, 635, 5th edit.; Crawshay *v.* Maule, 1 Swanst. 514, the Reporter's note; Jones *v.* Noy, 2 Mylne & Keen, 125, 129, 130; Wrexham *v.* Huddleston, 1 Swanst. R. 514, note; Waters *v.* Taylor, 2 Ves. & Beames, R. 299; Wray *v.* Hutchinson, 2 Mylne & Keen, 235, 238. —Vinnius (Comm. ad. Inst. Lib. 3, tit. 26, § 8) puts the doctrine in its true light, as to inability from poverty or misfortune. — "Postremo etiam egestate unius socii societas solvitur, egestate scilicet extrema, id est, bonorum omnium, aut tantum non omnium amissione. Nam cum societas contrahatur bonorum in commune quærendorum causa, non magis bonis sublatis societati locus esse potest, quam sublata persona socii. Amittuntur bona aut civitate salva, veluti cessione, id est, si socius, ære alieno oppressus, bonis suis creditoribus cesserit, eaque à creditoribus distracta fuerint; ac tum etiam societatem dirimi placet, aut civitate una cum bonis amissa, ut in specie præcedente; nam publicatione bona amitti, ipsum verbum publicationis satis indicat; eaque consideratione illa quoque ad hanc rationem dissolvendæ societatis referri potest. Sed et decoctione bona amittuntur et pereunt. Cæterum decoctione sola societatem solvi negat Straccha, nisi ea ad manifestam egistatem socium redegerit. Non puto autem, quod hic traditur de dissolutione societatis ob amissionem bonorum, locum habere eo casu, quo nihil pecuniæ in societatem collatum est, aut quo ille, qui operam tantum contulit, bona salva civitate amisit, nisi forte ob bona amissa speratam operam præstare nequeat." See also Voet ad Pand. Lib. 17, tit. 2, § 26, Tom. 1, p. 761. —Mr. Bell has made the following striking remarks upon this subject: "Incapacity by disease. (1.) If the partnership proceed in reliance on such aid from a partner, as any bodily illness he may be affected with may prevent, it would seem to be a justifiable cause for having the partnership judicially dissolved, or for renouncing the partnership, although there should be a fixed term of duration not yet arrived. (2.) Insanity has the effect, not only of depriving the partner of the power of aiding the partnership by his exertions, but it prevents him from controlling, for his own safety, the proceedings of his copartners. And, accordingly, where there

§ 293. The same doctrine is fully borne out by the true spirit and intendment of the Roman law, which adopts the like provision, enabling any party to renounce the partnership, whenever its objects are no longer attainable. The passage already cited establishes this right, whenever the conditions of the partnership are not capable of being fulfilled, or the fruits thereof cannot be properly enjoyed.[1] *Quia conditio quædam, quâ societas erat coïta, ei non præstatur.*[2] *Vel quod ea re frui non liceat, cujus gratiâ negotiatio suscepta sit.*[3] The same doctrine is applied to the case of a partner who is grievously oppressed with debt, at least, when it

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are two partners, both of whom are to contribute their skill and industry, the insanity of one of them, by which he is rendered incapable of contributing that skill and industry, seems to be a good ground to put an end to the partnership. At the same time it may be observed, that these are cases of infinite delicacy. There is no line of distinction by which it shall be ascertained how long a term of inability shall justify measures of this description. A broken leg, or an accidental blow, may incapacitate a partner for a time as much as insanity, and the one may be as temporary as the other; and, perhaps the nearest approximation to be made to a rule on the subject is, that a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends. (3.) Cases may be supposed of danger so imminent, from bad health, lunacy, habits of intoxication, etc., as to make the continuance of the partnership likely to prove ruinous to all concerned; as in the case of uncontrollable habits of intoxication in the partner of a gunpowder manufactory. In cases of this description there can be no doubt that such perils will afford ground for judicial interference to dissolve the company. But it may be doubted, whether they would not justify the other partners in entering the act of dissolution in the books, to be followed up as soon as possible by judicial measures; for such a state of things may occur at the commencement of a long vacation, when no proper opportunity can be had of dissolving by judicial interposition." 2 Bell, Comm. B. 7, ch. 2, p. 634, 635, 5th edit.

[1] Ante, § 273, 289.

[2] Dig. Lib. 17, tit. 2, l. 14; Pothier, Pand. Lib. 17, tit. 2, n. 68; Ante, § 273.

[3] Dig. Lib. 17, tit. 2, l. 15; Pothier, Pand. Lib. 17, tit. 2, n. 68; Pothier, de Société, n. 152.

amounts to insolvency. *Item si quis ex sociis mole debiti prægravatus, bonis suis cesserit, et ideo propter publica aut privata debita substantia ejus veneat, solvitur societas.*[1] Another of the causes enumerated in that law for a dissolution of partnership, is the absolute poverty or total loss of the property of one partner. *Dissociamur egestate.*[2]

§ 294. Pothier fully recognizes the same doctrine.[3] He also puts the corresponding case of the partner becoming paralytic, or otherwise infirm, whose skill and diligence are relied on to conduct the business, or manufacture the articles of the trade; and holds, that such an occurrence constitutes a sufficient ground for a dissolution.[4] In each of these cases, however, the asserted inability, or incapacity, does not, either in the Roman law, or the French law, constitute *per se* a positive dissolution; but it only confers the right of elec-

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[1] Inst. Lib. 3, tit. 26, § 8; Domat, B. 1, tit. 8, § 5, art. 12. — Domat has in this place summed up the main principles of the Roman law on all these and the like incapacities. "If one of the partners (says he) is reduced to such a condition, that he cannot contribute to the community what he is obliged to furnish, whether in money, or in labor, the other partners may exclude him from the society; as, if his goods are seized on; if he has relinquished them to his creditors; if he labors under any infirmity or any other inconvenience that hinders him from acting; if he is excluded from the management of his concerns, as being a prodigal; if he falls into a frenzy. For in all these cases, the partners may justly exclude from the partnership him, who, ceasing to contribute to it, ceases to have a right to it. But this is to be understood only for the time to come; and the partner who may chance to be excluded for any one of these causes, ought to lose nothing of the profits which may come to his share in proportion to the contributions which he had already made."

[2] Dig. Lib. 17, tit. 2, l. 4, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 54, 62; Domat, B. 1, tit. 8, § 5, art. 12.

[3] Pothier, de Societé, n. 141, 142, 148; Domat, B. 1, tit. 8, § 5, art. 12.

[4] Pothier, de Societé, n. 142, 152; Civil Code of France, art. 1871; Domat, B. 1, tit. 8, § 5, art. 12.

tion upon the other partners, to do so at their pleasure by an open renunciation.[1] In this respect it is in perfect coincidence with the doctrine of the common law.

§ 295. An incapacity of a different sort, but which leads directly to the same right of dissolution, is that of insanity; for it is obvious, that, under such circumstances, the business either cannot be carried on at all, or not as beneficially for all the parties, as was contemplated in the formation of the original partnership. Indeed, theoretically speaking, as insanity amounts to a positive incapacity of the party to contract during its continuance, and as the supposed agency and authority given by each partner to the others to transact the business of the partnership in the name of all, may be deemed during the like period to be suspended or

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[1] Domat, B. 1, tit. 8, § 5, art. 12, and note, Ibid.; Pothier, de Société, n. 142, 152. — Pothier says: "The same thing may be said of the case of an habitual infirmity or disease, which occurs to one of the partners. It will be a just cause for him to renounce the partnership, if the business of the partnership be such that it requires his personal attention." Pothier, de Société, n. 152. The Civil Code of France (art. 1871), declares: "Dissolution of partnerships for a term cannot be demanded by one of the partners, before the term agreed, unless for just motives, as where another partner fails in his engagements, or that an habitual infirmity renders him unfit for the affairs of the partnership, or other similar cases, the lawfulness and weight of which are left to the arbitration of Judges." Ante, § 274. See also Code of Louisiana (1825), art. 2858, 2859, which declares: "Although the partnership may have been entered into for a limited time, one of the partners may, provided he has a just cause for the same, dissolve the partnership before the time, even although inconveniences might result for the partners, and although it might have been stipulated, that the partners could not desist from the partnership before the stipulated time. There is just cause for a partner to dissolve the partnership before the appointed time, when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of the partnership, which require his presence or his personal attendance."

revoked,[1] the natural conclusion would seem to be, that no valid act can be done, or contract can be made,

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[1] Story on Agency, § 481.—The following note, appended to that section, may not be unimportant upon the point here under consideration. "This is clear, where the party's lunacy is established under an inquisition, or where he is put under guardianship. But some doubt seems to be entertained, whether, before such inquisition or guardianship, there is any implied suspension or revocation of the agent's authority. Mr. Bell (1 Bell, Comm. § 413, p. 395, 396, 4th edit.; Id. p. 489, 5th edit.) considers insanity, not so established, to be no suspension or revocation of the authority. He says: 'Insanity is to be judged of differently. There is here neither an implied natural termination to the authority; nor is there an existing will to recall the former appointment; nor is the act notorious, by which the public may be aware of such failure of capacity. It was to this interesting question chiefly, that the metaphysical discussion, to which I have already alluded, was applied. But the strong practical ground of good sense, on which the question was disposed of, as relative to the public, was, that insanity is contradistinguished from death by the want of notoriety; that all general delegations of power, on which a credit is once raised with the trading world, subsist in force to bind the grantor, till recalled by some public act or individual notice; and that, while they continue in uninterrupted operation relied on by the public, they are, in law, to be held as available generally; leaving particular cases to be distinguished by special circumstances of *mala fides*. The question does not appear to have occurred in England; but the opinion of very eminent English counsel was taken in a case, which was tried in Scotland, and they held the acts of the procurator to be effectual to the public against the estate of the person by whom the procuratory was granted.' He states, in his note (1) the Scottish case, in the following words: 'Pollock against Patterson. The case in which this question occurred to be tried, was compromised, and I had imagined was not reported. But after I had prepared a note from my own papers, to subjoin here, I found the case well and ably reported in the Faculty Collection, to which I refer the reader. The opinions of the Judges are peculiarly worthy of perusal; not being confined to the narrow state of the question, as it occurred technically, but extending to a large and comprehensive discussion of the general question, as to the effect of insanity on such powers. 10th December, 1811, 14 Fac. Coll. 369.' In note (2), he refers to the opinions of counsel taken in England, in these words: 'After stating the terms of the procuration, as on this and the preceding page, and that, after the insanity of the grantor, the procurator had continued to carry on the business of a

during the insanity of any partner, which should be binding upon the partnership. The common law, however, does not in this respect follow out the theoretical principle; but, upon grounds of public policy or convenience, holds, that insanity does not ordinarily *per se* amount to a positive dissolution of the partnership; but only to a good and sufficient cause for a Court of Equity to decree a dissolution.[1] We say ordinarily;

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banker for the principal, the question put was, Whether, in these circumstances, the transactions of Mr. John Patterson, under his father's procuration, are good to those who transacted with him from the date of it to the period of stopping.' The answer by Sir Vicary Gibbs (afterwards Lord Chief Justice of the Common Pleas), Sir Samuel Romilly, and Mr. Adam (now Lord Chief Commissioner of the Scottish Jury Court), was, 'We think they are good.' Mr. Chancellor Kent, in his Commentaries, inclines to the same opinion. 2 Kent, Comm. Lect. 41, p. 645, 4th edit. Would a deed or sale, executed personally by a party manifestly insane at the time, be valid? If not, can his agent be in a better condition?"

[1] Sayer *v.* Bennet, 1 Cox, R. 107; Pearce *v.* Chamberlain, 1 Ves. R. 34, 35; Leof *v.* Coles, 12 Eng. Law & Eq. R. 117; Wrexham *v.* Huddleston, 1 Swanst. R. 514, note, and see Ibid. the Reporter's note; Waters *v.* Taylor, 2 Ves. & Beames, 299, 302, 303; Kirby *v.* Carr, 3 Younge & Coll. R. 184; Jones *v.* Noy, 2 Mylne & Keen, 125; 1 Story on Eq. Jurisp. § 673; 3 Kent, Comm. Lect. 43, p. 58, 4th edit.; Watson on Partn. ch. 7, p. 382, 2d edit.; Griswold *v.* Waddington, 15 Johns. R. 57, per Mr. Ch. Just. Spencer.—In Sayer *v.* Bennet (1 Cox, 107, 109), Lord Kenyon (then Master of the Rolls) said: "I think, indeed, it may be laid down as a general rule (without considering the particular circumstances of the case), that when partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a Court of Equity ought to interfere for both their sakes; for both have stakes in the partnership, and are interested in having it carried on properly; and the Court ought to see, that the property of the party, unable to take care of himself, should be taken care of for him. It appears, that few people care to leave the management of their property to other persons; and as a lunatic has no power of managing his own property, so a Court of Equity will not deliver it to persons to whom the party himself has not committed it. If, therefore, the defendant continued in the same situation as he has been, I should have no difficulty in saying that the partnership ought to be dissolved, though there may be no precedent for the purpose. As to

for, where the insanity has been positively ascertained, under a commission of lunacy, or by the regular judi-

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what is said with respect to a substitute for defendant, that is what Sayer never intended by the partnership; he never meant to take a partner from a Court of Equity. The next thing is, how far his present situation ought to influence the Court. I think I may say, that, if it were clearly established, that Bennet had recovered his senses, and there was no probability of a relapse, it would be too much to dissolve the partnership; (nor if it were otherwise, could this Court dissolve it with a retrospect to the time of the disorder's commencing; for as his capital has been embarked, during all that time, he must have the profits of it). If I was clearly satisfied, that Bennet was restored to a sound mind, and could afford the proper assistance to Sayer, the partnership ought not to be dissolved. In Huddleston's case it does not appear, what was the extent of the dejection of mind. Everybody knows that it is very frequent for persons once mad to recover. And in this case I cannot find what the apothecary forms his opinion upon, as to the likelihood of Bennet's recovery. I am astonished that neither party examined Dr. Monro; he ought to have had frequent and recent opportunities of seeing him. Every lunatic is supposed to have lucid intervals; and it might be, that these were selected for his being seen by these witnesses; at least it is not made to appear sufficiently to me. His family, with whom he has lived, ought to have stated it. Under these circumstances I have great difficulty. On the principle I have no doubt; but I cannot tell how the circumstances apply. I must, therefore, direct a new kind of inquiry, which is, the Master must inquire whether Bennet is now in such a state of mind as to be able to conduct this business in partnership with Mr. Sayer, according to the articles of copartnership; for if he has merely a ray of intellect, I ought not to reingraft him in his partnership, and that in mercy to both, for the property of both is concerned; and he who cannot dispose of his property by law, must be restrained here. I have, therefore, no manner of doubt of the principle." In Waters *v.* Taylor (2 Ves. & Beames, 299, 302, 303), Lord Eldon said: "It was supposed that I had contradicted Lord Kenyon's doctrine in Sayer *v.* Bennet. Certainly I did not contradict that doctrine; nor did I make any decree, which, duly considered, was an assent to it. The case was no more than this; one partner becoming a lunatic, the others thought proper by their own act to put an end to the partnership; which they had no right to do, if he had been sane; and they continued to carry on the business with his capital; not being able to state, what was his, as a creditor, and what was not his, as a partner. That, Lord Kenyon thought, afforded sufficient ground for saying the partnership was not determined; and he also held, that one partner cannot, on account of the lunacy of another, put an end to the partnership; but that object must be attained

cial appointment of a guardian to the lunatic, it may deserve consideration, whether it does not *ipso facto* amount to a clear case of dissolution of the partnership by operation of law; since it immediately suspends the whole functions and rights of the party to act per-

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through the decree of a Court of Equity. My decision was not intended either to support or impeach that, proceeding upon the particular circumstances of the case before me. The question, whether lunacy is to be considered a dissolution, is not before me. I shall therefore say no more upon it, than this. If a case had arisen, in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it, that he could not perform his contract, there could be no damages for the breach in consequence of the act of God. But it would be very difficult for a Court of Equity to hold one man to his contract, when it is perfectly clear that the other could not execute his part of it. It will be quite time enough to determine that case, when it shall arise; for, as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short; and the degree may admit of great variety. I would not, therefore, lay down any general rule by anticipation, speculating upon such circumstances. I agree with Lord Thurlow, that the jurisdiction is most difficult and delicate, and to be exercised with great caution." In Jones *v.* Noy (2 M. & K. 125, 129, 130), Sir John Leach (Master of the Rolls) said: "It is clear upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement, is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution. But in that case, I consider with Lord Kenyon, that, in order to make it a ground of dissolution, he must obtain a decree of the Court. If he does not apply to the Court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business, in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope, there can be no dissolution." See also Gow on Partn. ch. 5, § 1, p. 221, 3d edit.; Besch *v.* Frolick, 1 Phill. Ch. R. 172; Sander *v.* Sander, 2 Collyer, R. 276.

sonally.[1] The Roman law seems fully to have inculcated the same doctrine, upon the ground that a madman has no capacity to contract.[2]

§ 296. Under the Roman law the other partners not only had a right to renounce the partnership, where any one of the partners was a prodigal or a madman, if he was put under guardianship on account of his prodigality or insanity; but his guardian also was clothed with the like authority, which, however, as he was at liberty to exercise it as his election, does not seem to have been understood as amounting *per se* to a dissolution.[3] *Sancimus* (says the Code) *veterum dubitatione semotâ, licentiam habere furiosi curatorem dissolvere, si maluerit societatem furiosi, et sociis licere ei renuntiare.*[4]

§ 297. But although insanity may thus constitute a sufficient ground to justify a Court of Equity in de-

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[1] Story on Agency, § 481. — Mr. Collyer (Collyer on Partn. B. 2, ch. 3, 3, p. 195, 2d edit.) seems to think that a decree for a dissolution is still necessary, notwithstanding a commission of lunacy has found the partner a lunatic. The case of Milne *v.* Bartlett, cited by him from The Jurist (Eng.), Vol. 3, p. 358, certainly seems to support the view which he takes of the subject. But, at the same time, it cannot escape observation, that the point was not made at the Bar, and that the decree would have been equally correct, if it had proceeded to decree an account upon the ground that the dissolution was already complete. I confess myself to have difficulty in comprehending how a partnership can still exist, after one partner is put under guardianship by reason of insanity. See also Duvergier, Droit Civil Franc. Tom. 5, tit. 9, § 443 to 446.

[2] In negotiis contrahendis alia causa habita est furiosorum, alia eorum, qui fari possunt, quamvis actum rei non intelligerent; nam furiosus nullum negotium contrahere potest; pupillus omnia, tutore auctore, agere potest. (Dig. Lib. 50, tit. 17, l. 5.) Furiosi, vel ejus cui bonis interdictum sit, nulla voluntas est. (Dig. Lib. 50, tit. 17, l. 40.)

[3] Domat, B. 1, tit. 8, § 5, art. 12, 13.

[4] Cod. Lib. 4, tit. 37, l. 7; Pothier, Pand. Lib. 17, tit. 2, n. 67; Domat, B. 1, tit. 8, § 5, art. 12, 13.

creeing a dissolution; yet we are to understand this doctrine, and indeed, all other cases of personal infirmity or disability, in a qualified sense, and with its appropriate limitations. It is not the mere fact of the existence of such insanity, infirmity, or other disability, supervening, that will justify the Court in the application of such an extraordinary remedy. But it must be of such a character, as amounts to a permanent or confirmed disqualification to perform the duties of the partnership. If the insanity, or infirmity, or other disability, be of a temporary or fugitive nature; if it be merely an occasional malady, or accidental illness, or an insanity, admitting of long lucid intervals, or mild and gentle in its character, amounting to little more than a dejection of mind; if there be a fair prospect of recovery within a reasonable time; then, and in such cases, there is no fit ground for a Court of Equity to decree a dissolution; for every partnership must be presumed to be entered into, subject to the common incidents of life, such as temporary illness, infirmity, or insanity.[1] The case must be far more stringent; the hope of a recovery must be remote; the character of the disease must be permanent and confirmed; and the impracticability of resuming the partnership duties, until after a period of indefinite and doubtful duration, must be apparent and decisive.[2]

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[1] 2 Bell, Comm. B. 7, ch. 2, p. 624, 5th edit.

[2] Gow on Partn. ch. 5, § 1, p. 221, 222, 3d edit.; Id. Suppl. 1841, p. 64; Watson on Partn. ch. 7, p. 382, 2d edit.; Jones v. Noy, 2 Mylne & K. 125.—Mr. Gow has well said: "But, as the duration of the disorder may be protracted or circumscribed, and the degree may admit of variety, it is impossible speculatively to lay down any general rule on the subject; since such a rule, in its application, must vary according as the malady is

Even when a Court of Equity will, on account of the insanity of a partner, dissolve the partnership, it will not give a retrospective effect to its decree, by carrying back the dissolution to the time when the insanity commenced, or even to the time of filing the bill; but it will generally confine the dissolution to the time of the decree.[1]

[§ 297 *a*. But where by articles the partnership between two persons was to be dissolved on either party giving the other six months' notice; and one of the parties becoming deranged in his intellect, the other gave the required notice; the partnership was declared to have been dissolved in pursuance of the notice, and not merely from the time of the decree, notwithstanding the insanity of the party to whom it was addressed.[2]]

§ 298. There may be, and indeed are, various other circumstances and changes of state or condition which may, in like manner, justify a Court of Equity in dissolving a partnership; such, for example, as in the cases already hinted at,[3] of the long absence of one partner in the public service; or his protracted ab-

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either confirmed insanity, or mere temporary illness, or dejection of mind, and according as the prospect of recovery is speedy or remote. Each case must be governed and decided by its own peculiar circumstances. However, whatever may be the nature of the disorder, one partner cannot, in consequence of such an affliction, put an end to the partnership by his own act; that object can only be attained through the medium of the decree of a Court of Equity." Sadler *v.* Lee, 6 Beavan, R. 324.

[1] Besch *v.* Frolick, 1 Phill. Ch. R. 172, 176; Sander *v.* Sander, 2 Collyer, R. 276.

[2] Robertson *v.* Lockie, 15 Simons, R. 205. See also Bagshaw *v.* Parker, 10 Beavan, R. 532.

[3] Ante, § 274, 291, 292.

sence abroad for mere personal or private objects; or his change of domicile to another state or country;[1] or his voluntary engagement in any other incompatible pursuits. In all such cases, if the business and interests of the partnership will be thereby materially obstructed, or suspended, or interfered with, to the prejudice of the other partners, it will furnish a just and reasonable cause for a Court of Equity to dissolve the partnership. The Roman law on this point speaks at once the language of common sense and public convenience.[2] There are other incapacities and disabilities, which operate, *ipso facto*, a dissolution of the partnership, without any intervention of a Court of Justice; but these will come properly under consideration, when we treat of the cases of dissolution by mere operation of law.

§ 299. Analogous to the cases of a dissolution by the decree of a Court of Equity, is that of a dissolution which is adjudged by the award of arbitrators, upon a proper submission of the case to them by the consent of all the partners. Where there is a direct submission of the very question to arbitrators by the express terms of the submission, there does not seem to be any, the slightest difficulty, in holding, that an award in the premises, directly awarding a dissolution, will, *ipso facto*, if unimpeached and unimpeachable, amount to a positive dissolution.[3] And this is so for two reasons; the

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[1] See Whitman *v.* Leonard, 3 Pick. R. 177, 179. [Explained and limited in Arnold *v.* Brown, 24 Pick. 94.]

[2] Dig. Lib. 17, tit. 2, l. 16; Pothier, Pand. Lib. 17, tit. 2, n. 68; Pothier, de Societé, n. 152.

[3] Watson on Partn. ch. 7, p. 383, 384, 2d edit.; Collyer on Partn. B. 2, ch. 2, § 2, p. 152, 153, 2d edit.; Gow on Partn. ch. 5, § 1, p. 230, 3d

one of which is, that it is competent, in point of law, for the arbitrators to make such an award obligatory upon the parties, as the decree of a tribunal of their own choice.[1] The other is, that the dissolution of the partnership may properly be treated, as made with the consent of all the partners.[2]

§ 300. The question, however, may arise, and, indeed, has arisen, whether, when the arbitrators have not, in express terms, awarded a dissolution, it may nevertheless be implied from the very nature and operation of the actual clauses of the award itself? And it has been held, that it may, if the award admits of no other just and reasonable interpretation. Thus, for example, if it is awarded by the arbitrators, that the affairs of the partnership shall be wound up, or that all the partnership property shall be sold and delivered to the partner, who shall become the purchaser; or that one partner shall take all the property and pay all the debts of the partnership; in these and the like cases, it seems to be clear, that a dissolution of the partnership is positively intended by the arbitrators.[3]

§ 301. The only other important question of a practical nature under this head is, What terms in the submission will amount to an implied authority to the arbitrators to dissolve the partnership? Thus, for example, where all matters in difference between the partners are referred to arbitrators, if they should award a dissolution of the partnership, it may be made a question,

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edit.; Heath *v.* Sansom, 4 Barn. & Adol. R. 172; Street *v.* Rigby, 6 Ves. 815.

1 Heath *v.* Sansom, 4 Barn. & Adol. 172.

2 Ibid.

3 Heath *v.* Sansom, 4 Barn. & Adol. 172; Byers *v.* Van Deusen, 5 Wend. R. 268.

whether the arbitrators, by such an award, have not exceeded their authority. In a case of this sort, the Court held, that under such a submission it was clearly within the scope of the authority of the arbitrators to award a dissolution of the partnership.[1]

§ 302. We come, in the next place, to the consideration of the dissolution of partnership by mere operation of law. And this is divisible into various heads. (1.) Dissolution by the change of the state (*status*) or condition of one or more of the partners. (2.) Dissolution by the transfer of the property of one or more of the partners, by their own act, or by the act of the law. (3.) Dissolution by the bankruptcy and insolvency or one or more of the partners. (4.) Dissolution by a public war between the countries, of which the partners are respectively subjects. (5.) Dissolution by the death of one or more of the partners. These heads may seem somewhat to run into each other; but a distinct consideration of them, in the order stated, may enable us to see the principles applicable to each in a more exact and comprehensive manner, than could otherwise be conveniently done.

§ 303. And first, as to dissolution by the change of the state or condition of one or more of the partners. This, of course, must arise, whenever the incapacity further to act, *sui juris*, results by operation of law from such change of state or condition. To this head we might refer the case of persons, who, being partners, are put under actual tutelage or guardianship, and are by the local law disabled to act, *sui juris;* such as persons becoming insane, idiotic, spendthrifts, or otherwise, from excessive weakness or vice, being placed under tutelage

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[1] Green *v.* Waring, 1 Wm. Black. R. 475.

or guardianship;[1] for the continuance of the partnership contract would seem necessarily founded upon the personal capacity of the partner to act and bind himself in the partnership transactions. We have already seen how this subject is dealt with in the Roman and foreign law.[2]

§ 304. So, again, the same result will arise at the common law, where a party has lost his capacity to act *sui juris*, by reason of his outlawry, or conviction and attainder of felony, or treason.[3] These two last cases are not only founded upon the personal incapacity of the parties; but also upon the further consideration, that by the attainder the crown becomes entitled to all the partnership effects, by virtue of its prerogative; that is to say, to the moiety or share of the convict-partner, by way of forfeiture; and to the moiety or shares of all the other innocent partners, upon the extraordinary (if it does not deserve the stronger epithets of extravagant and oppressive) technical doctrine, that it is beneath the dignity of the crown to become a joint tenant, or a tenant in common with a subject, and, therefore, the king shall take the whole by his prerogative.[4] No such doctrine has ever been promulgated in

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[1] Ante, § 295, 296; Domat, B. 1, tit. 8, § 5, art. 12, 13; Cod. Lib. 4, tit. 37, l. 7; Pothier, Pand. Lib. 17, tit. 2, n. 67; 2 Bell, Comm. B. 7, ch. 2, p. 634, 635, 5th edit.; Griswold *v.* Waddington, 16 Johns. R. 438, 491.

[2] Ante, § 295, 296.

[3] Collyer on Partn. B. 1, ch. 2, § 2, p. 71, 2d edit.

[4] Collyer on Partn. B. 1, ch. 2, § 2, p. 71, 72, 2d edit.; Watson on Partn. ch. 6, p. 377, 2d edit.; Gow on Partn. ch. 5, § 1, p. 216, 217, 3d edit.—Mr. Watson (p. 377, 378) has stated the reasons of the doctrine, and its hardship, in the following terms: "Before concluding this chapter upon the death of partners, it may be proper to consider the consequences of one partner becoming civilly dead, by outlawry or by attainder for treason or felony. The outlaw or convict, being dead in law, incapable of entering into any contract, bringing any suit, or holding any property, it is clear, that a part-

America; and even in England it has become obsolete in practice, although it is still a subsisting prerogative,

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nership, in which he was, is *ipso facto* dissolved. He is as incapable of the functions of a partner in trade, as if the breath had left his body. The effects of his delinquency are extremely severe upon his copartner, who remains a good and lawful man. And here is one of those instances, in which by our law the innocent suffer with the guilty; which rather shock us at first sight, but which may be well contrived for the prevention of crimes, and the general good of the commonwealth. Upon the outlawry or attainder of one partner, all the partnership effects become vested in the crown. The share of the partner outlawed or attainted is, in the first place, forfeited to the crown; whereby, if the king were capable of being so, he would become joint tenant or tenant in common of the partnership effects with the other partner; but as this would be inconsistent with the dignity of the monarch, he is strictly entitled to the whole. Sir Wm. Blackstone says: 'The king cannot have a joint property with any person in one entire chattel, or such a one as is not capable of division or separation. But where the titles of the king and the subject concur, the king is entitled to the whole; in like manner, as the king cannot, either by grant or contract, become a joint tenant of a chattel real with another person; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property; if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel; and so if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown, the king shall have the entire horse and entire debt. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person. From which two principles it is a necessary consequence, that the innocent, though unfortunate partner, must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.' One good effect of this doctrine, with regard to partnership, is, that it may render a man cautious as to the persons with whom he forms this relation, and that it renders it his interest to strive to preserve them in the path of loyalty and virtue. Besides; although such are the strict rights of the crown, in the mild spirit of modern times, they are not likely ever to be enforced, either against creditors or deserving partners." This is perhaps the best apology which can be made for the doctrine; but it is impossible to disguise either its gross injustice, or its mischievous tendency. Why should innocent persons be at the mercy of the crown, whether they are to be involved in positive ruin or not? The case of the late Mr. Fauntleroy would afford a striking instance of the terrific results of such a prerogative."

which may spring upon and produce the ruin of the innocent and unwary partners.

§ 305. The same result (that is, a dissolution of the partnership), without any of the odious features attached to prerogative, is, under the like circumstances, fully established in the Roman and foreign law, whenever, by a change of the state or condition, any one of the partners is disabled from the performance of the appropriate duties of the partnership, as by the loss of his personal liberty and power of action by banishment, or by bankruptcy, or by insolvency, or by a judicial prohibition to act in his business, or by a confiscation of his property, or by his civil death.[1] In the Roman law a distinction was taken between the cases of great, and intermediate, and of small disabilities. The two former dissolved the partnership; the latter did not. *Pariter* (says Pothier, quoting the Digest) *solvitur societas capitis diminutione socii maxima aut media. Hinc,* "*Publicatione quoque distrahi societatem diximus. Quod videtur spectare ad universorum bonorum publicationem, si socii bona publicentur. Nam cum in ejus locum alius succedat, pro mortuo habetur.*"[2] *Minima autem capitis diminutione non solvitur. Quocirca,* "*Si filius-familias societatem coierit, deinde emancipatus a patre fuerit, apud Julianum quæritur, an eadem societas, duret, an vero alia sit, si forte post emancipationem in societate duratum est? Julianus scripsit* (*Libro* 14 *Digestorum*), *eamdem societatem durare; initium enim in his contractibus inspiciendum. Duabus autem actionibus agendum esse, una adversus patrem, altera adversus filium; cum patre, de eo, cujus dies ante emancipationem cessit; nam ejus temporis, quo post emancipationem societas duravit, nihil præstare patrem oportet; cum filio au-*

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[1] See Griswold *v.* Waddington, 16 Johns. R. 438, 491.

[2] Dig. Lib. 17, tit. 2, l. 65, § 12; Pothier, Pand. Lib. 17, tit. 2, n. 61.

tem, de utroque tempore, id est, de tota societate. Nam et si quid (inquit), socius filii, post emancipationem filii, dolo fecerit, ejus, non patri, sed filio actio danda est."[1] *Similiter nec adrogatione socii solvetur societas; non tamen ad adrogatorem transibit. Hoc docet Paulus; "Societas quemadmodum ad heredes socii non transit, ita nec ad adrogatorem; ne alioquin invitus quis socius efficiatur, cui non vult. Ipse autem adrogatus socius permanet; nam et si filiusfamilias emancipatus fuerit, permanebit socius."*[2] *Aliud in servo; nam quum personam non habeat, nec nisi ex persona domini socius esse possit, sequitur quod hujus manumissione aut alienatione solvatur societas. Hoc docet Ulpianus; "Si servus meus societatem cum Titio coierit, et alienatus in eadem permanserit, potest dici, alienatione servi et priorem societatem finitam, et ex integro alteram inchoatam; atque ideo et mihi et emptori actionem pro socio competere. Item, tam adversus me, quam adversus emptorem, ex his causis, quæ ante alienationem inciderunt, dandam actionem; ex reliquis, adversus emptorem solum."*[3] Pothier asserts

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[1] Dig. Lib. 17, tit. 2, l. 58, § 2; Pothier, Pand. Lib. 17, tit. 2, n. 61.

[2] Ibid.

[3] Pothier, Pand. Lib. 17, tit. 2, n. 60, 61; Domat, B. 1, tit. 8, § 5, art. 15; Dig. Lib. 17, tit. 2, l. 65, § 22; Id. l. 58, § 3.— Vinnius and Heineccius have commented on this subject in their Commentaries to the Institutes. Lib. 3, tit. 26, § 7, De Publicatione, p. 774, edit. 1777. The comment is as follows: "Quod Paulus, dictæ L. actione, 65, § Publicatione, 12 hoc tit. unde hic locus desumptus est, dicit, Publicatione bonorum socii distrahi societatem, hoc Modestinus et Ulpianus dixerunt, societatem solvi capitis deminutione, L. 4, § 1, d. L. verum. 63, § ult. eod. Intelligunt enim capitis deminutionem maximam et mediam, cum socius severitate sententiæ aut in servitutem redigitur, aut in insulam deportatur, quo casu bona damnati publicari solent, L. 1, de bon. damn. L. 8, § 1 & 2, qui testam fac. Poterat hæc species dissociationis etiam ad præcedens genus referri, ad eam videlicet, quæ morte socii contingit. Quibus enim libertas aut civitas adempta est, hi jure civili pro mortuis habentur; eoque pertinet, quod dicitur in d. L. verum. 63, § ult. homines interire aut morte, aut maxima et media capitas deminutione. Sed et alia ratione ad sequens genus referri potest. VINN. Atqui si obæratus bonis cedit, bona non publicantur, sed vendantur; nec is pro mortuo habetur, cu-

the same to be the doctrine of the French law,[1] and it is now positively affirmed by the Civil Code of France,[2] and the Code of Louisiana.[3]

§ 306. Again; the marriage of a female partner will, at the common law, for the like reason, create a dissolution of the partnership by mere operation of law; for, in the first place, by the marriage, all her personal property and effects are transferred to and belong to her husband in his own right, unless indeed there be some reservation or valid contract to the contrary;[4] and in the next place, the marriage creates a positive personal incapacity on her part any further to enter into, or to bind herself by any contract.[5]

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jus substantia veniit, sed cujus bona ob delictum consecrata publicatave sunt. Vide L. 63, § 10, L. 58, L. 65, § 1 & 2, ff. pro Soc. HEINECC.

[1] Pothier, de Societé, n. 147, 148.

[2] Code Civil of France, art. 1865.

[3] Code of Louisiana (of 1825), art. 2847. — It has been held by the Supreme Court of Massachusetts, that the absconding of one partner is a dissolution of the partnership, between the parties, and as to third persons, who had notice thereof. Whitman *v.* Leonard, 3 Pick. R. 177, 179. [In Arnold *v.* Brown, 24 Pick. 94, it is said: "Nor will the voluntary absence of one of the partners from the State, produce a dissolution. Some of the *dicta* in Whitman *v.* Leonard, 3 Pick. 179, certainly favor the plaintiff's position. But they were not necessary to the decision of the case, and if they were, must be taken in connection with the circumstances of that case. There were facts enough to show the note to be grossly fraudulent, without relying upon the absconding of one of the partners. The Chief Justice says, 'here was an absconding of one partner, which dissolved the partnership.' The absence was longer in that case than this, and attended with many circumstances to distinguish it from this. It well might be that *there* was such an absconding as would amount to a dissolution, and yet the temporary absence in this not produce the same effect. In England the absconding would be an act of bankruptcy, and the bankruptcy, when determined by regular adjudication, would create a dissolution. But the absconding is never relied upon, there, as a dissolution. And we do not think that the absence of one of the partners, under the circumstances disclosed in this report, amounted to a dissolution of the partnership."]

[4] 1 Black. Comm. 442, 443, 444; 2 Story, Eq. Jur. § 1367.

[5] Ibid.; Gow on Partn. ch. 5, § 1, p. 226, 3d edit.; Watson on Partn. ch.

§ 307. In the next place, as to dissolution by a voluntary assignment by one or more of the partners of all his right, title, and interest in the partnership property. It seems now well established at the common law, that if one partner does make such a voluntary assignment of all right, title, and interest in the partnership property and effects, that will at once dissolve the partnership, and convert the assignee or purchaser into a tenant in common with the other partners.[1] If the assignment be *bonâ fide*, and unexceptionable in other respects, this would seem to be the necessary operation of law upon such an act; for (as we have already seen), every partnership being founded in the voluntary consent of all the parties thereto, and that consent being founded upon a *delectus personarum*, no partner has any

7, p. 384; 2 Bell, Comm. B. 7, ch. 2, p. 634, 5th edit.; Griswold *v.* Waddington, 15 Johns. R. 57, 82. — Mr. Gow and Mr. Watson treat the point as doubtful, although their opinions coincide with that expressed in the text. The point seems to have been directly decided by Lord Eldon in Nerot *v.* Burnand, 4 Russ. R. 247, 260. He there said: "The next question is, When did the partnership terminate? It was a partnership for no definite period; and either party therefore might, at any moment, have put an end to it by notice. Miss Nerot married Mr. Burnand, without consulting her brother, or, at least, without his assent. If she chose so to change her situation, as to make Mr. Nerot, in point of fact, if the partnership went on, a partner with Burnand, Mr. Nerot had a right, the moment he received notice of that step, to act upon it, and say, 'Your marriage has put an end to the partnership.' No delay took place in that respect; for the bill was filed as early as Hilary term, 1820, the marriage having taken place towards the close of the preceding year. I agree, therefore, with the Vice-Chancellor, in saying, that the partnership was dissolved on the 16th of September, 1819." See also Gow's Supplement, 1841, p. 64.

[1] Marquand *v.* President and Directors of N. York Manuf. Co. 17 Johns. R. 525; Ketcham *v.* Clark, 6 Johns. R. 144; Ante, § 272; 3 Kent, Comm. Lect. 43, p. 59, 4th edit.; Rodriguez *v.* Heffernan, 5 Johns. Ch. R. 417, 428; Nicoll *v.* Mumford, 4 Johns. Ch. R. 522, 525. [But in such case the other partners may hold possession of the property as against the assignee, for the purpose of paying the debts and winding up the business of the concern. Horton's Appeal, 1 Harris, 67.]

right whatsoever to introduce a mere stranger into the firm, without the consent of all the other partners;[1] and if such consent is given, then it becomes, to all intents and purposes, the substitution of a new partnership for the old one. And this is equally the doctrine of our law, and of the Roman law, and of the modern foreign law.[2] The Roman law states the rule and the reason of it in very succinct and expressive terms. *Cum enim societas consensu contrahitur, socius mihi esse non potest, quem ego socium esse nolui.*[3]

§ 308. Indeed, there never could be any doubt, that a general assignment by one or more partners will produce this effect, when the partnership is for an indefinite period, and determinable at will; for, in such a case, the assignment *per se* operates at once as a dissolution, upon due notice thereof by the party making or receiving the assignment. The only point open for discussion seems to be, whether the same conclusion ought to be admitted, when the partnership is for a fixed or definite period, and the assignment is made within that period, in contravention of the partnership articles. And it has been held, that if the assignment is made *bonâ fide*, it operates, *ipso facto*, as a dissolution of the partnership, since the purchaser is not compellable to become a partner, nor, on the other hand, are the other partners compellable to admit him as such.[4]

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[1] Ante, § 5; Inst. Lib. 3, tit. 26, § 5, 8; 3 Kent, Comm. Lect. 43, p. 59, 4th edit.; Ex parte Barrow, 2 Rose, R. 252, 253, 254; Murray *v.* Bogert, 14 Johns. R. 318; Kingman *v.* Spurr, 7 Pick. R. 235.

[2] Ante, § 5; Inst. Lib. 3, tit. 26, § 8.

[3] Dig. Lib. 17, tit. 2, l. 19; Pothier, Pand. Lib. 17, tit. 2, n. 28; Ante, § 5.

[4] Per Lord Denman in Heath *v.* Sansom, 4 Barn. & Adol. 175; Marquand *v.* Pres. & Directors of N. York Manuf. Co. 17 Johns. R. 525, 529, 535.—On this occasion Mr. Chancellor Kent said: "The suit was for a

§ 309. The like rule seems to have prevailed in the Roman law; for there an assignment, by a debtor

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settlement of partnership account, on the ground of its dissolution by the act of Fitch, one of the partners. He became indebted to the New York Manufacturing Company, in a very large amount, which he was unable to pay, and accordingly on the 14th of April, 1814, he assigned over to them all his share, or undivided estate and interest in the copartnership between him and the appellants. In May following, Fitch actually stopped payment, and became insolvent. It was contended on the part of the Manufacturing Company, that the copartnership was dissolved by the assignment in April, or, at least, by the insolvency in May. This was denied on the part of the appellants, on the ground, that by the original articles of copartnership, it was to continue until dissolved by the death of one of the parties, or until two of them should demand a dissolution. According to the construction given to the articles by the appellants, they had a right to keep the capital of Fitch in their trade or concern, notwithstanding any assignment of his property to his creditors, and notwithstanding an actual insolvency on his part. I was of opinion that the partnership was dissolved by the assignment, and that the appellants were accountable for all the interest of Fitch in the capital and in the profits of the concern. I do not mean to say, that a voluntary assignment by Fitch, of his property to his creditors, may not be a breach of his contract or covenant with his copartners. The question, as between them, under their articles of agreement, it was not necessary to discuss. But the creditors of one copartner, who take his property by assignment, or on execution, cannot be involved against their consent in the responsibilities of a copartnership. The capital stock, or interest of a partner, is certainly liable to his separate debts. His creditors are entitled to it without the risk and burden of being partners. An act of bankruptcy, says Lord Mansfield (Cowp. 448), is a dissolution of the partnership, not only by virtue of the statutes of bankruptcy, but from the necessity of the thing, since assignees cannot carry on a trade. According to the doctrine on the part of the appellants, a party may lock up his capital in a mercantile house by such an agreement as the one in this case, and it must remain untouched without the consent of his copartners, during his life. If the creditors take it by assignment, they must become partners in the firm, and can only touch the yearly profits, and must be liable to the yearly losses, and for all the engagements of the firm. This doctrine appears to me to be too unreasonable, and too inconvenient, to be endured." This decree was affirmed unanimously by the Court of Errors; and on that occasion Mr. Justice Woodworth, in delivering the opinion of the Court, said: "An assignment made by the party himself, under circumstances like the present, produces the same

oppressed with debt, of all his title and interest in the property of the partnership, for the benefit of his creditors, was deemed a dissolution of the partnership. *Item* (say the Institutes), *si quis ex sociis, mole debiti prægravatus, bonis suis cesserit, et ideo propter publica aut privata debita substantia ejus veneat, solvitur societas. Sed, hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas.*[1]

§ 310. The authority of one partner voluntarily to

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result; in both cases, they give rise to a state of things altogether incompatible with the prosecution of a partnership concern, commenced, and previously conducted by the bankrupt and his former copartner. It is perfectly clear, that a new partner cannot be admitted without consent. This, *ex vi termini*, implies, that even consent would be nugatory, unless the assignee elected to become a partner; where he does not so elect, but (as in the present case) insists on a division of the property, the demand, according to acknowledged principles, cannot rightfully be denied. That a rule of this kind will, in some cases, and probably in the present, bear hard on the partners opposed to a dissolution, is not to be doubted. But its inconveniences are more than counterbalanced, by the superior benefits arising from its application. There is another insuperable difficulty opposed to a continuance of the partnership, and that arises from the character in which the respondents are placed. How can they become partners with Marquand & Barton? They are a corporate body, and act as trustees for the benefit of the stockholders. The bank had no power to become partners with the appellants; it was not within their corporate privileges. It will not be pretended, that in the situation Fitch was placed, he had not a right to assign his interest, and that it passed under the assignment to the respondents. I conclude, therefore, that the assignment by Fitch, *per se*, dissolved the partnership. In the case of Ketcham & Black *v.* Clark (6 Johns, R. 144), where one of the partners had executed an assignment of all his right in the partnership property and debts, it is said, that 'This act was, of itself, a termination of the partnership.' But there being no evidence of any public notice of the dissolution, nor any special notice to the party afterwards dealing with the firm, on that ground the partners were held liable. As between themselves, the point appeared to be conceded." See also 3 Kent, Comm. Lect. 43, p. 59, 4th edit.

[1] Inst. Lib. 3, tit. 26, § 8; Vinnius, Comment. ad Id., and Ante, § 292, 293; Domat, B. 1, tit. 8, § 5, art. 12.

assign a part of the partnership property in payment of, or as security for, the debts thereof, has been already considered, as also has been the authority of one partner to assign the entire partnership property for the payment of the debts due to all creditors of the partnership.[1] No one can doubt, that the former is perfectly valid and obligatory; and that thereby the property is severed from, and ceases to belong to, the partnership. If the latter be (as has been strenuously contended), also valid, but of which nevertheless serious doubts may be entertained, especially where the partnership is for a term of years, as yet unexpired, then it must be admitted, that it will amount by operation of law, to a dissolution of the partnership; for the case then falls within the scope of the doctrine already stated, in cases where the entire thing, constituting the foundation and object of the partnership, is extinct.[2]

§ 311. The next question is as to the operation of an involuntary assignment, or an assignment *in invitum*, under judicial process and proceedings. We have already seen,[3] that a separate creditor of any one partner may seize and sell the right, title, and interest of that partner in the partnership goods and effects, under a separate judgment and execution against him. The execution may be levied upon the whole of the tangible goods and effects of the partnership, or upon a part thereof; and in each case it is good to the extent

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[1] Ante, § 101, and note 3; Tapley *v.* Butterfield, 1 Metc. R. 515.

[2] Ante, § 101, and note 3, and § 280, 281; Havens *v.* Hussey, 5 Paige, R. 30, 31; Hitchcock *v.* St. John, 1 Hoffm. R. 511; Anderson *v.* Tompkins, 1 Brock. R. 456; Pierpont *v.* Graham, 4 Wash. Cir. R. 232; Tapley *v.* Butterfield, 1 Metc. R. 515; Dana *v.* Lull, 17 Vermont R. 390.

[3] Ante, § 261 to 263.

of the judgment debtor's right, title, and interest therein, as it shall ultimately appear upon the final adjustment and settlement of the partnership concerns.[1] But, as soon as the levy and sale are completed under the execution, the purchaser of the goods or effects becomes, by mere operation of law, a tenant in common thereof with the other partners; if the levy and sale be of a part only, then of that part; if of the whole, then of the entirety.[2] But in each case the legal result is the same, that is to say, it amounts to a dissolution of the partnership to the extent of the right, title, and interest, levied upon and sold under the execution. If the levy is of a part of the partnership property, there is a severance *pro tanto*, of the partnership interest therein; if of the whole, then there is a severance of the entirety.[3]

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[1] Ibid.

[2] Ante, § 261 to 263; 1 Story, Eq. Jur. § 677, 678; Moody *v.* Payne, 2 Johns. Ch. R. 548; Dutton *v.* Morrison, 17 Ves. 194, 206; Allen *v.* Wells, 22 Pick. R. 450.

[3] Gow on Partn. ch. 3, § 1, p. 229, 3d edit.; 3 Kent, Comm. Lect. 43, p. 59, 4th edit.; Fox *v.* Hanbury, Cowp. R. 445; Skip *v.* Harwood, 2 Swanst. R. 585, 586, note; Moody *v.* Payne, 2 Johns. Ch. R. 548; Renton *v.* Chaplain, 1 Stockt. 62; Nicoll *v.* Mumford, 4 Johns. Ch. R. 525; Rodriguez *v.* Heffernan, 5 Johns. Ch. R. 417, 428; Holroyd *v.* Wyatt, 1 De Gex & Smale, R. 125; Dutton *v.* Morrison, 17 Ves. 194, 206. — In this last case Lord Eldon said: "Another question remains, of far more difficulty, and of as much importance, as any that has been decided. Where a creditor takes out execution against the effects of an individual concerned in a partnership, it seems to be a very difficult thing to determine with certainty, how he is to take his execution. The old cases, if they are to govern, go in this simple course; that the creditor, finding a chattel, belonging to the two, laid hold of the entirety of it, considering it as belonging to the two; and paying himself by the application of one half, he took no further trouble. It is obvious, that it was very difficult to maintain this as an equitable proceeding, if a due proceeding at law; that a creditor of one partner should, without any attention to the rights of the partners themselves, take one half of a chattel belonging to them; as if it was perfectly clear that the interest of each was an

§ 312. The doctrine, in this view of the matter, as presented by the common law, stands upon clear and satisfactory grounds. If the sale is valid under the execution, it must, of course, subrogate the purchaser to all the rights of the partner himself in the property. Now, if such be the legal result, the purchaser is not bound to become a partner; nor are the other partners bound to admit him into the partnership. He must, therefore, hold a common and undivided interest with them in the property; and this can be only by treating it as a tenancy in common, created by operation of law. Whether it might not have been better, as an original question, to have held at the common law, that no separate creditor should be entitled to execute his judgment against the partnership property, leaving the latter exclusively liable to the joint creditors, it is too late to inquire. Certain it is, that the doctrine has very many practical difficulties and mischiefs attending it,

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equal moiety. On the other hand, it may be represented, that the world cannot know what is the distinct interest of each; and therefore it is better, that the apparent interest of each should be considered as his actual interest. But Courts of Equity have long held otherwise; and long before the case of Fox *v.* Hanbury, I understand this Court to have said that was not equitable; and to have held, as is the constant course at present, that upon an execution against one partner, or the *quasi* execution in bankruptcy, no more of the property, which the individual has, should be carried into the partnership, than that quantum of interest which he could extract out of the concerns of the partnership, after all the accounts of the partnership were taken, and the effects of that partnership were reduced into a dry mass of property, upon which no person except the partners themselves had any claim. In the case supposed by Lord Mansfield, a bill filed, where there was an execution at law, a Court of Equity has no difficulty in managing it; having the means of taking the complicated accounts of the partnership, and reducing the concern into that state, in which the property would be divisible as clear surplus. But the Court of King's Bench has repeatedly held, with considerable doubt of late how the object is to be accomplished, that a creditor taking execution can take only the interest his debtor had in the property."

independent of the apparent wrong and injury which may be done to the other partners by a sudden dissolution of the partnership at the instance of a third person, in violation of the obligations of the partners' own contract, that it shall endure for a limited period. It is a strange anomaly in jurisprudence, that third persons should be entitled to dissolve the solemn *bonâ fide* contracts of partners at their own caprice and pleasure, however ruinous may be the effects to the innocent partners; for the partnership may be thus dissolved in the midst of the progress of the most successful adventure, and thus irreparable losses may ensue therefrom. However, this is not a peculiar feature of the common law; for it is to be found equally recognized in the Roman law, at least where all the effects of the partner are sold to his creditors; for it is said: *Item, bonis a creditoribus venditis unius socii, distrahi societatem Labeo ait.*[1]

§ 313. Passing from this to the next case, which stands upon a close analogy, that of a dissolution of the partnership by the bankruptcy or insolvency of one or

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[1] Dig. Lib. 17, tit. 2, § 65; Pothier, Pand. Lib. 17, tit. 2, n. 62; Domat, B. 1, tit. 8, § 5, art. 12; 2 Kent, Comm. Lect. 43, p. 59, 4th edit.—No case of this sort is mentioned by Pothier. He speaks only of the dissolution of the partnership by the failure or bankruptcy of one partner; and (as it should seem) only of a sale of his effects consequent thereon. Pothier, de Societé, n. 148. See also Domat, B. 1, tit. 3, § 5, art. 12, note. The Code Civil of France, art. 1865, and the Code of Louisiana (of 1825), art. 2847, speak only of a dissolution by failure or bankruptcy. See also Duvergier, Droit Civil Franc. Tom. 5, § 443, 444, 445. It seems doubtful (to say the least), whether the Roman law contemplated any sale of the effects of one partner to be a dissolution of the partnership, except where the entirety was ordered to be sold by judicial process at the instance of his creditors, or by a *cessio bonorum* of all his effects for the benefit of his creditors. See La Croix, La Clef des Lois Romaines, tit. Societé, Tom. 2, p. 585. See also Mr. Chancellor Kent's observations in Griswold *v.* Waddington, 16 Johns. R. 491.

more of the partners, it may be remarked, that this naturally, and, indeed, upon just reasoning, necessarily produces this effect; for the bankrupt partner is thereby disabled to perform his portion of the partnership contract, since all his property is, by operation of law, immediately upon the declaration of his bankruptcy or insolvency, devested out of him; and it passes by assignment to the persons who are duly designated as the assignees thereof, to dispose of the same, and to distribute the proceeds among his creditors. The assignees are not, on the one hand, compellable to become partners, nor, on the other hand, are the other partners compellable to admit them into the partnership, for the reasons already suggested under the preceding head. But a more important, and an absolutely conclusive, ground is, that the further continuation of the partnership is utterly incompatible with the whole policy and objects of the bankrupt and insolvent systems. These systems contemplate an immediate sale and distribution of the assets among the creditors; and the assignees have no authority whatever to enter into any further engagements in any trade or business on account of the creditors, or at their risk.[1] Hence, the common law, the Roman law, and the modern foreign law, all concur in the same general result, that bankruptcy or insolvency is, of itself,[2] by mere operation of law, a complete

[1] Gow on Partn. ch. 5, § 1, p. 227, 228, 3d edit.; Collyer on Partn. B. 1, ch. 2, § 2, p. 69, 70, 71; Id. B. 4, ch. 1, p. 578, 579, 2d edit.; Fox v. Hanbury, Cowp. R. 445; Ex parte Smith, 5 Ves. 295; Wilson v. Greenwood, 1 Swanst. R. 471, 482, 483; Crawshay v. Collins, 15 Ves. 217, 223; Marquand v. New York Manuf. Company, 17 Johns. R. 525; Griswold v. Waddington, 15 Johns. R. 57, 82; s. c. 16 Johns. 436, 491; 3 Kent, Comm. Lect. 43, p. 38, 39, 4th edit.

[2] [In Massachusetts, the mere insolvency of one or both partners, meaning thereby their inability to pay their debts, will not, *per se*, and without

dissolution of the partnership.[1] *A fortiori*, the like doctrine applies, where all the partners become bankrupt; for then the whole property is devested out of all of them.

§ 314. Another question usually arises under this head; and that is, from what time is the partnership dissolved by the bankruptcy or insolvency of one or more of the partners? Is it from the act of bankruptcy or insolvency? Or from the judicial or other declaration of that fact, under the commission? Or from the time of the assignment of the property to the assignees? The rule now established, at least in the policy of the British system of bankruptcy, is, that the dissolution takes effect, immediately upon the declaration of the bankruptcy under the commission, by relation back to the time, when the act of bankruptcy was committed; so that from that period the bankrupt is deemed devested of all his property and effects; and, by operation of law, as soon as assignees are appointed, it is vested in them by relation from the same period.[2] How far, and to what intents and purposes, it suspends

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any assignment or legal proceedings, operate as a dissolution of the partnership, although it *might* furnish sufficient ground for declaring a dissolution. Arnold *v.* Brown, 24 Pick. 93.]

[1] Dig. Lib. 17, tit. 2, l. 65, § 1; Pothier, Pand. Lib. 17, tit. 2, n. 62; Pothier, de Societé, n. 148; Civil Code of France, art. 1865; Duvergier, Droit Civil Franc. Tom. 5, § 443; Code of Louisiana (1825), art. 2847; 2 Mor. & Carlt. Partidas, p. 773, l. 10; 2 Bell, Comm. B. 7, ch. 2, p. 643, 5th edit.; Vinn. ad Inst. Lib. 3, tit. 26, § 8, Comm.; Ante, § 309.

[2] 3 Kent, Comm. Lect. 43, p. 58, 59, 4th edit.; Watson on Partn. ch. 5, p. 302 to 312, 2d edit.; Gow on Partn. ch. 5, § 3, p. 298, 299, 3d edit.; Collyer on Partn. B. 4, ch. 1, p. 583 to 590, 2d edit.; Fox *v.* Hanbury, Cowp. R. 445; Hague *v.* Rolleston, 4 Burr. 2174; Ex parte Smith, 5 Ves. 295; Harvey *v.* Crickett, 5 Maule & Selw. 336; Dutton *v.* Morrison, 17 Ves. 194, 203, 204; Barker *v.* Goodair, 11 Ves. 78, 83; Thomason *v.* Frere, 10 East, 418.

the rights and authorities of the other solvent partners over the partnership, will come under examination, when we come to consider what are the consequences of a dissolution.

§ 315. In the next place, as to dissolution by a public war between the countries, of which the partners are respectively subjects. Although this point does not seem to have been discussed in our courts of justice until a comparatively recent period, yet it would seem to be a necessary result of principles of public law, well established, and clearly defined. By a declaration of war the respective subjects of each country become positive enemies of each other. They can carry on no commercial or other intercourse with each other; they can make no valid contracts with each other; they can institute no suits in the courts of either country; they can, properly speaking, hold no communication of an amicable nature with each other; and their property is mutually liable to capture and confiscation by the subjects of either country.[1] Now it is obvious from these considerations, that the whole objects and ends of the partnership, the application of the joint funds, skill, labor, and enterprise of all the partners in the common business thereof, can no longer be attained. The conclusion, therefore, would seem to be absolutely irresistible, that this mutual supervening

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[1] Potts *v.* Bell, 8 Term R. 561; The Rapid, 8 Cranch, 155, 161; The Julia, 8 Cranch, 181, 194; The Hoop, 1 Robin. R. 196; Griswold *v.* Waddington, 15 Johns. R. 57; s. c. 16 Johns. R. 438. — In this last case all the existing authorities upon the whole subject, foreign as well as domestic, were brought together, and critically examined with very great learning and ability. See also 2 Wheaton's Reports, Appendix, p. 27 to 37; 3 Kent, Comm. Lect. 43, p. 62, 4th edit.; Scholefield *v.* Eichelberger, 7 Peters, R. 586.

incapacity must, upon the very principles applied to all analogous cases, amount to a positive dissolution of the partnership.

§ 316. The law of nations does not even stop at the points already stated; but it proceeds further. The question of enemy, or not, depends not upon the natural allegiance of the partners, but upon their domicile. If, therefore, the partnership is established, and, as it were, domiciled in a neutral country, and all the partners reside there, it is treated as a neutral establishment, and is entitled to protection accordingly.[1] On the other hand, if any one or more of the partners, in such a case, is domiciled in an enemy country, he is treated personally as an enemy, and his share of the partnership property is liable to capture and condemnation accordingly, notwithstanding the partnership establishment is in the neutral country.[2] What, then, is the case, where the partnership is established, and, as it were, domiciled in an enemy country? The rule, then, fully recognized as applicable to the case, is, that the partnership is to be treated throughout as a hostile establishment, and the whole partnership property is liable to capture and condemnation, as enemies' property, notwithstanding one or more of the partners may be domiciled in a neutral country. *A fortiori*, if some of the partners are domiciled in one of the hostile countries, and the rest in the other, it is clear that the partnership is hostile, and the partners are also personally enemies.[3] The just inference from all these con-

[1] The Venus, 8 Cranch, R. 253; The Indian Chief, 3 Robin. R. 26; McConnell *v.* Hector, 1 Bos. & Pull. 113; Griswold *v.* Waddington, 15 Johns. R. 57; s. c. 16 Johns. R. 438.

[2] The Franklin, 6 Robin. R. 127.

[3] The Vigilantia, 1 Robin. R. 1; The Sampson, cited in the Franklin,

siderations seems, therefore, to be, that, in all these cases, there is an utter incompatibility, created by operation of law, between the partners, as to their respective rights, duties, and obligations, both public and private, and, therefore, that a dissolution must necessarily result therefrom, independent of the will or acts of the parties.[1]

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6 Robin. R. 127; The Friendshaft, 4 Wheat. R. 105; The San Jose Indiano, 2 Gallis. R. 268.

[1] This whole subject came successively before the Supreme Court of New York, and the Court of Errors of that State, in the case of Griswold *v.* Waddington, 15 Johns. R. 57; and s. c. 16 Johns. 438. The masterly judgments of Mr. Chief Justice Spencer, and Mr. Chancellor Kent, delivered on this occasion, exhaust the whole learning and reasoning upon it; and are, indeed, judicial discussions of rare and exquisite ability, research, force, accuracy, and comprehensiveness. — The ultimate decision was, that the partnership was dissolved, by the occurrence of war between the countries. The following extract, from the opinion of Mr. Chief Justice Spencer, presents a clear though brief review of the principle. He said: "Upon the fullest reflection which I have been able to give to the subject, my opinion is, that the declaration of war between the United States and Great Britain produced a suspension during the war, or, *ipso facto*, a dissolution of the partnership previously existing between the defendants, so that the one is not responsible upon the contract, express or implied, of the other. It will be perceived, that this proposition assumes the fact, that the partnership between the defendants had not become dissolved by the efflux of time, or the acts of either of the partners, although this point is, in itself, very questionable. The better conclusion from the evidence is, that the copartnership expired by its own limitation during the war; and the existence of the war would, at all events, dispense with the public notice, which is, in general, necessary to the valid dissolution of a partnership. The case discloses, that the firm of Henry Waddington & Co. consisted of Henry and Joshua Waddington; that Henry is a British subject, resident, before and during the war, in London, conducting the partnership concerns there, whilst the defendant was resident here. The negotiations, which gave rise to the present suit, took place in England, and exclusively with Henry Waddington, during the late war between this country and Great Britain. It was admitted on the argument, and so the fact undoubtedly is, that the proposition I have advanced, is neither supported nor denied by any judicial decisions or elementary writer of the common law; but, if I mistake not, it is supported by the strongest reasons, and by necessary analogy with

§ 317. In the next and last place, as to a dissolution by the death of one of the partners. There is no

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adjudged cases. The first inquiry is, what are the objects and ends of partnerships? They are entered into with a view, that with the joint funds, skill, and labor, of the several partners, the interests of the concern may be advanced and promoted. There may be, and frequently are, different inducements influencing each partner; one may have more capital and credit; another may have more skill, activity, and experience. The one may choose to be a dormant and inert partner, furnishing an equivalent for the services and skill of the other, and leaving the business entirely to his control and management. But unexplained as this partnership is, we must understand it to be an union with a view to the employment of the joint capital, labor, and skill of both the partners, for the purposes of internal and external commerce between this country and Great Britain. That the object of the partnership embraced both these objects of internal and external trade, would seem to be unquestionable, from the local position of the partners. That the death, insanity, or bankruptcy of one of the partners operates as a dissolution, was not questioned in the argument; and a respectable elementary writer, Mr. Watson, is of opinion, that the marriage of a *feme sole* partner would produce the same consequence. The cases of Pearce *v.* Chamberlain (2 Ves. 33), and Sayer *v.* Bennet (Watson, 382), and several other cases cited by him, all go to establish the general principle, that death, insanity, and bankruptcy, work a dissolution of partnerships; and they proceed on the principle, that the other partners are not bound to admit the representatives of a deceased or insane partner into the concern, the confidence having been originally placed in the personal skill and assistance of those no longer able to afford it. Let these principles be applied to the present case, and it would seem that the same result is inevitable. In what situation did the war put the defendants, as regarded each other? Most undeniably, the two nations, and all their citizens, or subjects, became enemies of each other, and the consequence of this hostility was, that all intercourse and communication between them became unlawful. This is not only the acknowledged principle of the law of nations, but is also a part of the municipal jurisprudence of every country. I need not cite cases in support of a position, which has so repeatedly been recognized in the English Courts, and in our own, possessing, as well admiralty, as common law jurisdiction. Another consequence of the war was, that the shipments made by each of the partners would be liable to capture and condemnation by the cruisers of the government of the other. And another very serious evil attended them; no debts, contracted in the partnership name, could be recovered in the courts of either nation; they not having, in the language of the law, a *persona standi in judicio*, whilst they were amenable

doubt, that, by the principles of the common law, the death of any one partner will operate as a dissolution

to suits in the Courts of both nations. The Hoop, 1 Rob. 201. It is true, the same disability to sue for debts due the firm, antecedent to the war, would exist. This, however, does not weaken the objection; it remains still an important item, in considering whether a partnership exists, when the new debts created are to be liable to the same disability. It appears, that Joshua Waddington is a citizen of the United States; and it has been already mentioned, that Henry Waddington is a British born subject. They owed different allegiances; and it became part of their duty to lend all their aid in a vigorous prosecution of the war, the one to the United States, and the other to Great Britain. And, it appears to me, that it would not comport with policy or morality, that the law should imperiously continue a connection, when, by its very continuance, it would afford such strong inducements to a violation of that fidelity which each owes to his government. Again; all communication and intercourse being rendered unlawful, and it being a well-established principle, that either partner may, by his own act, dissolve a partnership, unless restrained to continue it for a definite period by compact, in what manner could such intentions be manifested during the war? It, might, indeed, be made known to the public of one of the countries, but it could not be notified to the public of the hostile country; and thus, unless the war produced a dissolution, he would be responsible, notwithstanding he had the desire to dissolve the connection, merely from inability to make known that determination; an inability produced by events utterly uncontrollable. When the objects and intentions of an union of two or more individuals to prosecute commercial business are considered; when it is seen, that an event has taken place, without their fault, and beyond their control, which renders their respective nations, and, along with them, the defendants themselves, enemies of each other; that all communication and intercourse have become unlawful; that they can no longer coöperate in the conduct of their common business, by affording each other advice, and are kept hoodwinked as to the conduct of each other; that the trade itself in which they were engaged, has ceased to exist; that if they enter into any contracts, they are incapable of enforcing their performance by an appeal to the courts; that their allegiance leads them to support opposite and conflicting interests; I am compelled to say, that the law cannot be so unjust, as to pronounce that a partnership so circumstanced, when all its objects and ends are prostrated, shall continue; and, with the clearest conviction upon my mind, and in analogy to the cases to which reference has been made, I have come to the conclusion that the partnership between the defendants was, at least, suspended, and I incline to the opinion that it was, *ipso facto*, dissolved by the war, and consequently,

of the partnership, however numerous the association may be, not only as to the deceased partner, but as between all the survivors.[1] The reason is, that upon the theory of this branch of the law, the personal qualities, skill, diligence, and superintendence of each one of the partners, are justly presumed to enter into and to constitute a material consideration with all the other partners for engaging in the partnership. In short, it is a mutual and reciprocal engagement of each partner with all the others, that the partnership shall be carried on with the joint aid and coöperation of all; and, therefore, the survivors ought not to be held bound to continue the connection without a new consent, when the abilities, skill, and character of the deceased partner either were, or at least might have been, a strong inducement to the original formation of the partnership.[2]

§ 318. This is precisely the reason given in the Roman law for the promulgation and support of the like doctrine, not only as working a dissolution as to the deceased partner, but as between the survivors. *Morte unius [socii] societas dissolvitur, etsi consensu omni-*

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that the defendant, J. W., is not liable to this action." Mr. Chancellor Kent's is far more elaborate, and sifts and examines all the authorities, as well as the reasoning in support of them. It is difficult to abridge it without diminishing its cogency. He holds the war to be a positive dissolution.

[1] Collyer on Partn. B. 1, ch. 2, § 2, p. 72, 73, 2d edit.; Watson on Partn. ch. 6, p. 358, 359, 360, 2d edit.; Gow on Partn. ch. 5, § 1, p. 219, 220, 3d edit.; Crawshay *v.* Maule, 1 Swanst. R. 495, 509; Gillespie *v.* Hamilton, 3 Madd. R. 254; Vulliamy *v.* Noble, 3 Meriv. R. 614; Scholefield *v.* Taylor, 7 Peters, R. 586.

[2] 3 Kent, Comm. Lect. 43, p. 55, 4th edit.; Watson on Partn. ch. 6, p. 358, 359, 2d edit.; Collyer on Partn. B. 1, ch. 2, § 2, p. 72, 73, 2d edit.; Pearce *v.* Chamberlain, 2 Ves. 33; Gow on Partn. ch. 5, § 1, p. 219, 220, 3d edit.; Scholefield *v.* Eichelberger, 8 Peters, R. 586, 594.

um coïta sit, plures vero supersint, nisi in coeunda societate aliter convenerit.[1] And again in the Institutes it is said: *Solvitur adhuc societas etiam morte socii; quia qui societatem contrahit, certam personam sibi eligit. Sed et si consensu pluriam societas contracta sit, morte unius socii solvitur, etsi plures supersint; nisi in coeunda societate aliter convenerit.*[2] So strictly, indeed, was this doctrine held, that (as we have seen), even an express agreement, that the partnership should be prolonged beyond the life of a partner, and his heir or other representative should be admitted into the same, was held in the Roman law to be invalid, as defeating an essential ingredient in partnership, the right of *Delectus personæ.*[3] The Digest says: *Adeo morte solvitur societas, ut ne ab initio facisci possimus, ut hæres etiam succedat societati.*[4] Pothier has still more fully expounded the reasons of the doctrine, although he admits at the same time, that, so far as it respects the succession of the heir, or personal representative, it is not entirely decisive, and has more of subtilty than of solidity in it.[5] There is,

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[1] Dig. Lib. 17, tit. 2, l. 65, § 9; Pothier, de Societé, n. 66.

[2] Inst. Lib. 3, tit. 26, § 5.

[3] Ante, § 5; Crawshay *v.* Maule, 1 Swanst. 509, the Reporter's note (a); Gow on Partn. ch. 5, § 1, p. 220, 3d edit.; Domat, B. 1, tit. 8, § 5, art. 12.

[4] Dig. Lib. 17, tit. 2, l. 59; Pothier, Pand. Lib. 17, tit. 2, n. 56.

[5] Pothier, de Societé, n. 144, 145, 146.—Vinnius also fully explains the doctrine. "Etiam morte unius socii societas solvitur. Et hoc genus distrahendæ obligationis societatis proprium est, recedens ab illo communi, quo placet, hæredem in eandem obligationem et idem jus, quod defuncti fuit, succedere. Sed admissum in societate ex natura hujus contractus; atque eadem ratione, qua in mandato, quoque placet morte mandatarii solvi mandatum; nimirum quia in societate non tantum rei familiaris, ut fere in aliis contractibus, verum insuper etiam fidei et industriæ, quæ ad hæredes non transeunt, contemplatio versatur. Nam, ut it textu dicitur, qui societatem contrahit, certam personam sibi eligit, cujus scilicet fidem, industriam, res, et facultates sequatur. Usque adeo autem, morte socii

indeed, an exception to this doctrine in the Roman law, founded upon public policy, and that is, that the death of one partner does not generally dissolve the partnership, in cases where the partnership is by the farmers of the public revenue.[1] *In societate vectigalium nihilominus manet societas, et post mortem alicujus; sed ita demum, si pars defuncti ad personam hæredis ejus adscripta sit, ut hæredi quoque conferri oporteat; quod ipsum ex causa æstimandum est.*[2] But then, again, to this there is, or may be, an exception. *Quod enim, si is mortuus sit, propter cujus operam maxime societas coïta sit? Aut sine quo societas administrari non possit?*[3]

§ 319. And, here, the question may arise, as to the time from which the dissolution, by the death of any partner, takes effect; whether it be from the occur-

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dirimi societatem placet, ut nec ab initio pacisci possimus, ut hæres in societatem succedat; quasi et tale pactum naturæ societatis repugnet, ut quis invitus socius efficiatur, cum non vult. Exceptæ tamen sunt societates vectigalium, in quibus hujusmodi conventiones ob publicam utilitatem admissæ; manetque hoc casu societas etiam post mortem, nisi forte is mortuus sit, cujus contemplatione potissimum societas coita, aut sine quo ea administrari non possit." Vinn. ad Inst. Lib. 26, § 5, p. 699, edit. 1726. Pothier says (n. 146): "La raison est, que les qualités personnelles de chacun des associés entrent en considération dans le contrat de société. Je ne dois donc pas être obligé, lorsque l'un de mes associés est mort, à demeurer en société avec les autres, parce qu'il se peut faire, que ce ne soit que par la considération des qualités personnelles de celui, qui est mort, que j'ai voulu contracter la société. Ce principe souffre exception à l'égard des sociétés pour la ferme des revenus publics, lesquelles subsistent entre les survivans, lorsque l'un des associés vient à mourir; hoc ita in privatis societatibus; in societate vectigalium manet societas et post mortem alicujus."

[1] Dig. Lib. 17, tit. 2, l. 59; Pothier, Pand. Lib. 17, tit. 2, n. 57; Pothier, de Societé, n. 146.

[2] Dig. Lib. 17, tit. 2, l. 59, 63, § 8; Pothier, Pand. Lib. 17, tit. 2, n. 57.

[3] Ibid.; Vinn. ad Inst. Lib. 3, tit. 26, § 5, p. 699, edit. 1726.

rence of that event, or from the period when the other partners have notice thereof. At the common law, the doctrine seems clearly established, that it takes effect in respect, as well to the other partners, as to third persons, from the time of the death, without any consideration, whether they have notice thereof, or not.[1] The Roman law, on the other hand, pursued a different course; and as between the partners themselves adopted the same rule, which it applied to cases of agency or mandate; that is, the partnership is not dissolved by the death of any partner, until the other partners have due notice thereof. *Quod, si, integris omnibus manentibus, alter decesserit, deinde tunc sequatur res, de quâ societatem coïerunt, tunc eadem distinctione utimur, quâ in mandato; ut, si quidem ignota fuerit mors alterius, valeat societas; si nota, non valeat.*[2] This also seems the doctrine of the French law, as laid down by Pothier.[3]

§ 319 *a*. But, although, as we have seen, a dissolution of the partnership takes place by law upon the death of any one of the partners, this proposition must be understood with the limitation, that, by the articles of copartnership or other agreement between the part-

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[1] Vulliamy *v.* Noble, 3 Meriv. R. 593, 614; Gow on Partn. ch. 5, § 1, p. 121, 3d edit.; Collyer on Partn. B. 1, ch. 2, § 2, p. 71, 74; Id. B. 3, ch. 3, § 4, p. 419, 2d edit.; 3 Kent, Comm. Lect. 43, p. 56, 4th edit.; 2 Bell, Comm. B. 7, ch. 2, p. 639, 5th edit.

[2] Dig. Lib. 17, tit. 2, l. 65, § 10; Pothier, Pand. Lib. 17, tit. 2, n. 58; Story on Bailm. § 203, 204, 205; Story on Agency, § 488 to 500; Domat, B. 1, tit. 8, § 6, art. 5.

[3] Pothier, de Société, n. 156, 157. — It is a curious coincidence, that the Consolato del Mare, in treating of persons who engage to build a ship together, treats death before the building is commenced, as a dissolution of the contract; and gives as one reason, not as the sole reason, that the day that any one dies, from that moment every partnership in which he is engaged, is dissolved, because a dead man cannot be a partner. See Consolato del Mare, ch. 4 [49]; Pardessus, Collect. de Lois Marit. Tom. 2, p. 51, 52.

ners, it is not otherwise stipulated by the parties. For it is entirely competent for the parties to vary this general result of law by an express agreement; and if such an agreement exists, it will depend upon the particular terms thereof, to what extent the estate of a deceased partner may be liable for debts contracted on behalf of the partnership after his death, whether his estate shall be generally liable for all the debts, or only to the extent of the property embarked and left in the partnership to be employed by the survivors.[1] The like questions may sometimes arise in cases of testators, who direct the partnership to be continued after their death, if assented to by the surviving partners. A testator may so direct the continuance of the partnership that his whole estate shall be liable for the postmortuary debts, or only to the amount of his actual interest in the partnership debts at his decease; and this sometimes becomes a question of great nicety in the construction of his words.[2] Nothing, however, but the clearest and most unambiguous language, showing in the most positive manner an intention on the part of the testator to render his general assets liable for debts contracted after his death, will justify a Court from extending the liability of his estate beyond the actual fund employed therein at the time of his death. And this rule obtains on account of the exceeding inconvenience and difficulty which would otherwise arise in paying off legacies and distributing

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[1] Burwell *v.* Mandeville's Ex'rs, 2 Howard, Sup. Ct. R. 560, and the cases there cited.

[2] Burwell *v.* Mandeville's Ex'rs, 2 How. Sup. Ct. R. 560; Ex parte Garland, 10 Ves. 110; Ex parte Richardson, 3 Madd. R. 138, 157; Thompson *v.* Andrews, 1 Mylne & Keen, 116; Pitkin *v.* Pitkin, 7 Conn. R. 307.

the surplus of the property. Thus, where A. died, while in partnership with B.; and in his will, made during his partnership, he made sundry bequests of his personal and real estate to different persons, and added, "And if my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay the same;" and in a codicil to his will, made also during the partnership, he said: "It is my will, that my interest in the copartnership subsisting between Daniel Cawood and myself, under the firm, &c., shall be continued therein until the expiration of the term limited by the articles between us. The business to be continued by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide." But before the time limited for the partnership expired, Cawood, who carried on the business, having failed, a bill was brought against him and the executors of A. by a creditor of the firm, upon debts contracted with him by Cawood, on account of the firm, after the death of A. It was held, that the general assets of the testator were not bound for the debts contracted after his death, by Cawood, on behalf of the partnership, but that the rights of any creditor in respect to such debts were exclusively restricted to the funds actually embarked by him in the trade, and to the personal responsibility of Cawood himself.[1] So, also, where the testator directed by his will that "all his interest and concern in the hat-manufacturing business, &c., as then conducted under said firm, should be continued to operate in the same connection for the

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[1] Burwell *v.* Mandeville's Ex'rs, 2 How. Sup. Ct. R. 560.

term of four years after his decease;" it was held, that the general assets of the testator were not liable to the claims of any creditors of the firm, who became such after the testator's death, and that such creditors had no lien on the estate in the hands of the devisees under the will, although they might eventually participate in the profit of the trade.[1]

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[1] Pitkin *v.* Pitkin, 7 Conn. R. 307. See also Ex parte Garland, 10 Ves. Jun. 110, and Ex parte Richardson, 3 Madd. R. 138.

CHAPTER XIV.

EFFECTS AND CONSEQUENCES OF A DISSOLUTION.

§ 320. HAVING ascertained the various causes, which either positively, *ipso facto*, produce a dissolution of the partnership, or may justify an application therefor to a Court of Equity, let us now proceed to the consideration of the effects and consequences of an actual dissolution, as between the partners themselves, and also as between them and third persons. And first, as between the partners themselves. Although these effects and consequences are in all cases of dissolution of partnership, however occasioned, in many respects governed by precisely the same rules and principles, and affected by the same general considerations; yet, as they are, at the same time, in particular cases, liable to be variously modified and affected by peculiar circumstances attendant upon them, it will here be proper, if not absolutely indispensable, to a full and accurate view of all the relations growing out of the subject, to examine it under various heads. (1.) Dissolution by the mere voluntary stipulations or acts of the parties *inter vivos*. (2.) Dissolution by bankruptcy. (3.) Dissolution by death. (4.) Dissolution by the decree of a Court of Equity. In each of these cases, it may be necessary to examine the effects and consequences as between the partners themselves, and also as between them and third persons.

§ 321. In the first place, then, as to a dissolution by

the voluntary acts or stipulations of the parties inter vivos. This may arise in various ways; as by the *retirement of one partner from the partnership, or the admission of a new partner into the partnership;* or by the voluntary separation of all the partners, and their final relinquishment of the whole business thereof. The former is a virtual destruction of the old partnership, by the substitution of a new one among the partners remaining in, or those coming into the firm; the latter is a total destruction or extinguishment thereof. The same result will arise (as we have seen), where the partnership is dissolved by the mere efflux of time, or by the voluntary change of the state or condition of one or more of the parties, or by an assignment of all the rights and interests of one or more of the partners therein.[1]

§ 322. But in whatever manner the partnership is actually ended, there are certain effects and consequences of its determination, which necessarily result from it as between themselves, and will equally affect their transactions with third persons, where the latter have notice of the dissolution, or where, as in cases of death and bankruptcy, notice is not by law required. In the first place, as between the partners themselves, the dissolution of the partnership puts an end to the joint powers and authorities of all the partners, any further to employ the property, or funds, or credit of the partnership in the business or trade thereof, subject to the exceptions hereinafter stated. None of the partners can create any new contracts or obligations binding upon the partnership; none of them can buy,

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[1] Ante, § 278, 280, 303, 304, 306, 307.

or sell, or pledge goods on account thereof; none of them can indorse, or transfer the partnership securities to third persons,[1] or in any other way make their acts the acts of the partnership. In short, none of them can do any act, or make any disposition of the partnership property or funds, in any manner inconsistent *with* the primary duty, now incumbent upon all of them, of winding up the whole concerns of the partnership.[2]

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[1] Fellows *v.* Wyman, 33 N. H. R. 351.

[2] National Bank *v.* Norton, 1 Hill, N. Y. Rep. 572; Palmer *v.* Dodge, 3 Ohio St. R. 28; Gow on Partn. ch. 5, § 2, p. 230, 240, 3d edit.; Id. p. 251, 252; Ex parte Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 Ves. 49, 57; Wilson *v.* Greenwood, 1 Swanst. R. 480; Crawshay *v.* Maule, 1 Swanst. R. 506; Whitman *v.* Leonard, 3 Pick. R. 177; Coll. on Partn. B. 1, ch. 2, § 3, p. 75, 2d edit.; Id. B. 2, ch. 2, § 1, p. 130; 3 Kent, Comm. Lect. 43, p. 63, 64, 4th edit.; 2 Bell, Comm. B. 7, ch. 2, p. 643, 644, 5th edit.; Kilgour *v.* Finlayson, 1 H. Black. R. 155; Brisban *v.* Boyd, 4 Paige, R. 17; Geortner *v.* Trustees of Canajoharie, 2 Barbour, R. 625.— The remarks of Lord Eldon on this subject, in Crawshay *v.* Collins (15 Ves. 218, 226), present this whole doctrine in a strong and just light. "Partnerships are regulated (said he) either by the express contract, or by the contract, implied by law, from the relation of the parties. The duties and obligations arising from that relation, are regulated, as far as they are touched, by the express contract; if it does not reach all those duties and obligations, they are implied, and enforced by the law. In the instance of a partnership without articles, the respective proportions of capital contributed by the partners and the trade being carried on either for a certain period, or the connection dissolvable at pleasure, the time being expired, or, in the other case, notice to determine being given, it cannot be contended, that, if the remaining partners choose to carry on the trade, they can consider the whole property as their own, to be taken at such valuation as they think proper to put upon it. That is not the law. The obligation implied among partners is, that they are to use the joint property for the benefit of all, whose property it is. Many complicated cases may arise. There may be a partnership, where, whether the parties have agreed for the determination of it at a particular period, or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons, it must continue; and then, instead of being, as it was, a general partnership, it is a general partnership deter-

[And it has been held that one partner, after dissolution, can not give a bill or note in the name of the firm, even for an antecedent debt; and although such partner is authorized to settle the business of the firm.[1]]

§ 323. And here the consideration naturally arises (which has been already touched in another place[2]), whether, since it is incompetent to any of the partners, after a dissolution, by any new acts, duties, or obligation, to bind the partnership, by any acknowledgments,

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mined, except as it still subsists for the purpose only of winding-up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner; in which case the law says, that the property survives to the others. It survives as to the legal title in many cases; but not as to the beneficial interest. The question then is, whether the surviving partners, instead of settling the accounts, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained, in the way in which it can be best ascertained, by sale. If the implied obligation is, that partners are to use the property for the benefit of those whose property it is, where is the hardship? I concur, therefore, with the judgment of Lord Rosslyn upon that point, in the case of Hammond v. Douglas; though I agree with the doubt, expressed by Sir Samuel Romilly, upon the other point there determined, that the good-will survives. If the surviving partners think proper to make that, which is in equity the joint property of the deceased and them, the foundation and plant of increased profit, if they do not think proper to settle with the executor, and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner."

[[1] Hurst v. Hill, 8 Md. R. 399; Speake v. White, 14 Texas, 364; Chase v. Kendall, 6 Ind. 304; Palmer v. Dodge, 4 Ohio, St. R. 21; Fowler v. Richardson, 3 Sneed, 508; Conklin v. Ogborn, 7 Ind. 553. In Kemp v. Coffin, 3 Iowa, 190, it was held that the settling partner might give the note of the firm in payment of a firm debt, in order to relinquish their property from attachment, and in Merrit v. Pollys, 16 B. Monroe, 355, it was thought that if the creditor taking the note of a firm after dissolution, made by a partner, had no notice of the dissolution, the firm would be bound.]

[2] Ante, § 107; Tassey v. Church, 4 Watts & Serg. 141.

or declarations, or statements, subsequently made by any one of the partners, respecting the real or supposed transactions, or duties, or obligations of the partnership, during the continuance thereof, are binding as evidence or otherwise upon the other partners, who have not assented thereto.[1] It seems difficult upon principle to perceive how they can be, any more than the declarations, or acts, or acknowledgments of any other agent of the partnership would be, after his agency has ceased.[2] In the latter case, they are constantly held inadmissible by the Courts of common law, upon grounds which seem absolutely irresistible.[3] And yet the contrary doctrine has been constantly maintained, as to partners, for a great length of time, in the Courts of common law in England, founded apparently upon a mere unreasoned decision in the time of Lord Mansfield;[4] and it is but recently that it has been overturned by an Act of Parliament,[5] which has remedied some of the mischiefs inherent in it, but has still left behind some which are as yet without redress.[6] The doctrine has been especially applied to, and, indeed, is most forcibly illus-

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[1] 3 Kent, Comm. Lect. 43, p. 49, 50, 51, 3d edit.; Parker *v.* Morrell, 2 Phillips, Ch. R. 464, and note.

[2] See the able case of Ellicott *v.* Nichols, 7 Gill, 86.

[3] Ante, § 134 to 138. See the reasoning of Sir Wm. Grant, in Fairlie *v.* Hastings, 10 Ves. 126, 127, and of Mr. Justice Kennedy, in Hannay *v.* Stewart, 6 Watts, 489. See also Garth *v.* Howard, 8 Bing. R. 451; Story on Agency, § 135, 136, and note.

[4] Whitcomb *v.* Whiting, Doug. R. 651.

[5] See the remarks of Lord Tenterden against the decision in Whitcomb *v.* Whiting (Doug. R. 651), in his opinion in Atkins *v.* Tredgold, 2 Barn. & Cresw. 23, 28, and of Mr. Justice Bayley, Id. p. 24, and of Mr. Justice Holroyd, Id. p. 31.

[6] Collyer on Partn. B. 3, ch. 1, § 4, p. 282 to 285, 2d edit.; Id. B. 3, ch. 3, § 4, p. 417, 418; 3 Kent, Comm. Lect. 43, p. 50, 51, and note (b), 4th edit.; Stat. of 9 Geo. 4, ch. 14 (9th of May, 1828). See Braithwaite *v.* Britain, 1 Keen, R. 206; Winter *v.* Innes, 4 Mylne & Craig, 111.

trated by cases of the revival of partnership debts, which are barred by the Statute of Limitations, by the simple acknowledgment of one partner, even, when made at a great distance of time after all the dissolution of the partnership, and, indeed, long after the partnership business has been closed by an actual settlement thereof *inter sese*.[1]

§ 324. In America no small diversity of judicial opinion has been expressed upon the same subject. In some of the States the English doctrine has been approved; in others it has been silently acquiesced in, or left doubtful;[2] and in a considerable number it has been expressly overruled.[3] The Supreme Court of the United States have not hesitated, after a most elaborate discussion, to overrule it, as unfounded in principle and analogy. In truth, the whole controversy must ultimately turn upon the single point, whether the acknowledgment is a mere continuation of the original promise, or whether it is a new contract, or promise, springing out of, and supported by the original consideration. It is upon the latter ground, that the Supreme Court have deemed the doctrine wholly untenable.[4]

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[1] 3 Kent, Comm. Lect. 43, p. 49, 50, 51, 4th edit.; s. P. Houser *v.* Irvine, 3 Watts & Serg. 345.

[2] Walton *v.* Robinson, 5 Iredell, 343.

[3] 3 Kent, Comm. Lect. 43, p. 49, 50, 51, 4th edit., where the principal authorities are collected. See also Levy *v.* Cadet, 17 Serg. & R. 126; Walden *v.* Sherburne, 15 Johns. R. 409; Baker *v.* Stackpole, 9 Cowen, R. 422, 423; Brisban *v.* Boyd, 4 Paige, R. 17; Cady *v.* Shepherd, 11 Pick. R. 400; Bell *v.* Morrison, 1 Peters, R. 351; Belote *v.* Wynne, 7 Yerger, R. 534; Tassey *v.* Church, 4 Watts & Serg. 141; Van Keuren *v.* Parmelee, 2 Comstock, R. 523. [In the last case, the decisions of the different States are reviewed by the New York Court of Appeals, and the doctrine of Lord Mansfield overruled.]

[4] The doctrine was apparently first applied in the case of Whitcomb *v.* Whiting (Doug. R. 652), in the case of a joint and several note of several

§ 324 *a*. But, however the doctrine may be after a dissolution, in cases where all the parties are living, it

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persons, not partners, upon the supposed analogy to the case of payment by one joint promisor. On that occasion Lord Mansfield dryly and briefly said: "Payment by one is payment for all, the one acting virtually as an agent for the rest. And in the same manner an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." A more inconclusive and unsatisfactory mode of reasoning can scarcely be imagined. In the first place (as we see in the text), payment by an agent, after his authority is withdrawn by his principal, is a payment which binds the creditor, but certainly not the principal; and the agent cannot recover the money so paid from his principal; although he may not be entitled (unless, indeed, it is paid under a sheer and mutual mistake) to recover it back from the creditor. Nor is it true, that payment by one partner, after a dissolution, of any debt, as a supposed partnership debt, binds the other partners. On the contrary, they have a right to say, that it never was, or was not at the time of the payment thereof, an existing partnership debt. Suppose it had been already either paid, or extinguished, how is the partnership liable to pay it again? It is assuming the very matter in controversy to assert, that a debt, once barred by the Statute of Limitations, is not extinguished, if voluntarily revived by the acknowledgment of one partner. What right or power has an agent, after his authority is dissolved, to make any acknowledgment or promise upon my account, to bind me? He may bind himself, if he pleases; but it will require some other reasoning to show that he can bind me. The reasoning against the English rule will perhaps be found as fully stated in the case of Bell *v.* Morrison (1 Peters, R. 351, 367 to 374), as in any other case. "It still remains (say the Court) to consider, whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute, as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt, need not be inquired into. To maintain the present action, it must be binding upon all. In the case of Bland *v.* Haslering (2 Vent. 151), where the action was against four, upon a joint promise, and the plea of the Statute of Limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three Judges, against Ventris, J., held that the plaintiff could not have judgment against the defendant who had made the promise. This case has been explained upon the ground, that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the Court, or of any of the Judges, proceeded solely upon such a ground. In Whitcomb *v.* Whiting (2 Doug. R. 652), decided in 1781, in an action on a joint and several note, brought against one of the makers, it was held, that proof of payment, by one of the

is very clear that no acknowledgment by the surviving partners after the death of one of them will revive the

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makers, of interest on the note and of part of the principal, within six years, took the case out of the statute, as against the defendant, who was sued. Lord Mansfield said: 'Payment by one is payment for all, the one acting virtually for all the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due.' This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party, who has the authority to discharge, has, necessarily, also, authority to charge the other; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very position constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole. But this arises, not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. If such payment were made after a positive refusal, or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he, who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or a necessary consequence from the other. A person may well authorize the payment of a debt, for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made. The doctrine of Whitcomb *v.* Whiting, has been followed in England in subsequent cases, and was applied in a strong manner, in Jackson *v.* Fairbank (2 H. Bl. 340), where the admission of a creditor to prove a debt, on a joint and several note, under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute, as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In Clark *v.* Bradshaw (3 Esp. R. 155), Lord Kenyon, at Nisi Prius, expressed some doubts upon it; and the cause went off on another ground. And in Brandram *v.* Wharton (1 Barn. & Ald. 463), the case was

debt against the estate of the deceased partner, and no acknowledgment by the representative of the de-

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very much shaken, if not overturned. Lord Ellenborough upon that occasion used language, from which his dissatisfaction with the whole doctrine may be clearly inferred. 'This doctrine,' said he, 'of rebutting the statute of limitations by an acknowledgment, other than that of the party himself, begun with the case of Whitcomb *v.* Whiting. By that decision, where, however, there was an express acknowledgment, by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others, to a debt; he may have actually paid it, he may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage, given him by the statute, by means of an implied acknowledgment.' The English cases, decided since the American Revolution, are, by an express statute of Kentucky, declared not to be of authority in their Courts; and consequently Whitcomb *v.* Whiting, in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle. In the American Courts, so far as our researches have extended, few cases have been litigated upon this question. In Smith *v.* D. & G. Ludlow (6 Johns. R. 267), the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given, that the other partner was authorized to adjust all accounts; and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved, that the plaintiff called on the partner, who pleaded the statute, before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were; and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The Court held, that this was sufficient to take the case out of the statute; and said, that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not, of itself, be evidence of an original debt; for that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident, from the cases of Whit-

ceased partner will revive the debt against the survivors.[1]

comb *v.* Whiting, and Jackson *v.* Fairbank; and it results necessarily from the power given to adjust accounts. The Court also thought the acknowledgment of the partner setting up the statute was sufficient, of itself, to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and the formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual but an express and notorious agency devolved on him, to settle the account. The correctness of the decision cannot, upon the general view taken by the Court, be questioned. In Roosevelt *v.* Marks (6 Johns. Ch. Rep. 266, 291), Mr. Chancellor Kent admitted the authority of Whitcomb *v.* Whiting, but denied that of Jackson *v.* Fairbank, for reasons which appear to us solid and satisfactory. Upon some other cases in New York we shall have occasion hereafter to comment. In Hunt *v.* Bridgham (2 Pick. R. 581), the Supreme Court of Massachusetts, upon the authority of the cases in Douglas, H. Blackstone, and Johnson, held that a partial payment by the principal debtor on a note took the case out of the statute of limitations, as against a surety. The Court did not proceed to any reasoning to establish the principle, considering it as the result of the authorities. Shelton *v.* Cocke (3 Munford, R. 191) is to the same effect; and contains a mere enunciation of the rule, without any discussion of its principle. Simpson *v.* Morrison (2 Bay, Rep. 533), proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt. Rep. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other States, as the doctrine is not so settled in Kentucky, we must resort to such recognition, only as furnishing illustrations to assist our reasoning, and decide the case now, as if it had never been decided before. By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business; but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts; and the right of partners, as such, can extend no further than to settle the partnership concerns already existing, and to distribute the remaining

[1] Atkins *v.* Tredgold, 2 Barn. & Cresw. 23; Slater *v.* Lawson, 1 Barn. & Adol. 396; Crallan *v.* Oulton, 2 Beavan, R. 7; Way *v.* Bassett, 5 Hare, R. 67.

§ 324 *b*. Another question has arisen; and that is, whether after the decease of one partner, the surviving

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funds. Even this right may be qualified and restrained, by the express delegation of the whole authority to one of the partners. The question is not, however, as to the authority of a partner, after the dissolution, to adjust an admitted and subsisting debt; we mean, admitted by the whole partnership, or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, and that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority; and, if so, as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void, as to them. There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said, that an acknowledgment revives the promise, when it is meant that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period, in which it had lost its legal use and validity. The act which revives it, is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the assumpsit, on which an action can be maintained. It was this view of the matter, which first created the doubt, whether it was necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome; and it is now held, that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off, as a support for the old. What, indeed, would seem to be decisive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the debt? The plain reason is, that the promise is a new one by or to the administrator himself, upon the original consideration, and not a revival of the original promise. So, if a man promises to pay a preëxisting debt, barred by the statute, when he is able, or at a future day, his ability must be shown, or the time must be passed, before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with.

partner can, in a suit brought to obtain payment of a debt due to a creditor of the firm out of the assets of

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We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment; but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute or as a conditional promise; which may depend upon the rules of pleading. This very point came before the twelve Judges, in the case of Hyling *v.* Hastings (1 Ld. Raym. 389, 421), in the time of Lord Holt. There, one of the points was, 'whether the acknowledgment of a debt within six years would amount to a new promise, to bring it out of the statute; and they were all of opinion, that it would not; but that it was evidence of a promise.' Here, then, the Judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise; and that it is the new promise, which takes the case out of the statute. Now, what is a new promise, but a new contract; a contract to pay, upon a preëxisting consideration, which does not, of itself, bind the party to pay, independently of the contract? So, in Boydell *v.* Drummond (2 Camp. R. 157), Lord Ellenborough, with his characteristic precision, said, 'If a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a new promise to pay it; and thus the remedy is revived.' And it may be affirmed, that the general current of the English, as well as the American authorities, conforms to this view of the operation of an acknowledgment. In Jones *v.* Moore (5 Binney, R. 573), Mr. Chief Justice Tilghman went into an elaborate examination of this very point; and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise; and he added, 'I cannot comprehend the meaning of reviving the old debt, in any other manner than by a new promise.' There is a class of cases, not yet adverted to, which materially illustrates the right and powers of partners, after the dissolution of the partnership, and bears directly on the point under consideration. In Hackley *v.* Patrick (3 Johns. R. 536), it was said by the Court, that, 'After a dissolution of the partnership, the power of one party to bind the others wholly ceases. There is no reason, why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note, in the name of the firm, or any other act.' And it was, therefore, held, that the plaintiff must produce further evidence of the existence of an antecedent debt, before he could recover; even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same Court, in Walden *v.* Sherburne (15 Johns. R. 409, 424), although it was admitted, that in Wood *v.* Braddick (1 Taunt. 104), a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of

the deceased partner, in which suit the surviving partner is made a party, set up the Statute of Limitations

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an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence, *aliunde*, of facts within the reach of the statute, as of the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs, against which the statute intended to guard the parties; viz. the introduction of stale and dormant demands, of long standing, and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason, why an acknowledgment should raise a new promise, when the consideration, upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the debt, as a debt; but are bound by the acknowledgment of the debt, as a promise, upon extrinsic proof. The doctrine in 1 Taunt. R. 104, stands upon a clear, if it be a legal ground; that, as to the things past, the partnership continues, and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy. The light in which we are disposed to consider this question, is, that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration, which is to raise such cause of action; whether it be a supposed preëxisting debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action, which has its life from the new promise, implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist, after a dissolution of the partnership, in any partner. There is a case in the Kentucky Reports, not cited at the bar, which coincides, as far as it goes, with our own views; and if taken as a general exposition of the law, according to its terms, is conclusive on this point. It is the case of Walker and Evans *v.* Duberry, 1 Marshall's Rep. 189. It is very briefly reported, and the opinion of the Court was as follows. 'We are of opinion, that the Court below improperly admitted, as evidence against Walker, the certificate of J. T. Evans, made after the dissolution of the partnership, between Walker and Evans, ac-

as a bar to a demand against the assets of the deceased; and it has been held that he cannot.[1] And it yet remains a matter of doubt, whether the representatives of the deceased partner can in such a suit set up the Statute of Limitations as a bar, so long as the surviving partner continues liable to the payment of the debt, as the deceased's estate is liable to be called upon by the surviving partner for contribution in case the latter pays the debt.[2]

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knowledging that the partnership firm was indebted to the defendant Duberry in the sum demanded, in the action brought by him in the Court below.' It cites 3 Johns. R. 536; 3 Munf. R. 191. It does not appear what was the state of facts in the Court below, nor whether this was an action in which the statute of limitations was pleaded, or only non assumpsit generally. But the position is generally asserted, that the acknowledgment of a debt by one partner after a dissolution is not evidence against the other. Whether the Court meant to say in no case whatever, or only when the debt itself was proved, *aliunde*, does not appear. The language is general, and would seem to include all cases; and if any qualification were intended, it would have been natural for the Court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt arises from the citations of 3 Johnson, and 3 Munford. The former has been already adverted to; and the latter, Shelton *v.* Cocke and others (3 Munf. R. 191), recognized the distinction asserted in 3 Johns. R. 536, as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the Court to a certain extent, and not as limitations of its extent. In any view, it leads us to the most serious doubts, whether the State Courts of Kentucky would ever adopt the doctrine of Whitcomb *v.* Whiting, in Douglas; especially so, as the early case in 2 Vent. 151, carries an almost irresistible presumption, that the Courts, at that time, held a doctrine entirely inconsistent with the case in Douglas." See also Ante, § 107.

[1] Winter *v.* Innes, 4 Mylne & Craig, 101.

[2] Winter *v.* Innes, 4 Mylne & Craig, 101, 111. — Lord Cottenham said: "When the simple case shall occur of the representatives of a deceased partner setting up the Statute of Limitations against a claim by a creditor of the firm, it will be to be considered whether such a defence can prevail whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner. If the equity of the creditor to go against the estate of the deceased partner

[§ 324 *c*. But after a dissolution of partnership, by death or otherwise, the surviving or continuing partners of the firm are, in a suit against them by persons claiming to be creditors of the partnership, entitled to the protection of the Statute of Limitations, although as between themselves and retired partners, or the estates of deceased partners, the partnership accounts are unsettled; and the retired partners, or the executors of a deceased partner, are in such a suit against them entitled to the like protection.[1]]

§ 325. On the other hand, notwithstanding the dissolution of the partnership, there still remain certain rights, duties, powers, authorities, and relations between them, which the law recognizes and supports, because they are, or may be, indispensable to the complete arrangement and final settlement of the affairs of the partnership; and, therefore, in a qualified and limited sense, the partnership may be said for those purposes to continue between the parties, until such arrange-

is founded upon the equity of the surviving partner against that estate, it would seem that the equity of the creditor ought not to be barred, so long as the equity of the surviving party continues, as that would be to create that circuity, which it is the object of the rule to prevent. In Braithwaite *v.* Britain, the Master of the Rolls thought that the statute did not operate, although nine years had elapsed. In this case it is not necessary to consider that general question; Mr. Bailie was himself a trustee and executor of the will of the deceased partner, and did not renounce till 1830; and Mr. Innes, who had the property, acted throughout on behalf of the estate of the deceased. And who now set up the Statute of Limitations? Not the executors of the deceased partner, who are not bound to plead the statute, but may, if they please, pay a just debt, though barrable by the statute; nor any one interested in his estate, but those who stand in the place of Mr. Innes as surviving partner. I think, therefore, that their defence cannot prevail." But see Way *v.* Bassett, 5 Hare, R. 68; Braithwaite *v.* Britain, 1 Keen, R. 206.

[1] Way *v.* Bassett, 5 Hare, R. 68; Brown *v.* Gordon, 15 Eng. Law & Eq. R. 340. See Ante, § 233 *a*.

ment and settlement take place.[1] Indeed, as has been well said by a learned author on this subject, from the very nature of a partnership, engagements may be contracted, which cannot be fulfilled during its existence, exposed as it is to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest must subsist, although, for all other purposes, the partnership is actually determined.[2]

§ 326. Besides; as we have already seen,[3] each partner, upon the dissolution of the partnership, has a perfect right, in the first place, to require that the partnership funds shall be directly and regularly applied to the discharge of the partnership debts and liabilities; and, after these are discharged, to have his share of the residue of the partnership funds.[4] This right is a privilege or lien on those funds, fully recognized and en-

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[1] Gow on Partn. ch. 5, § 2, p. 231, 3d edit.; Wilson *v.* Greenwood, 1 Swanst. R. 471, 480, 481; Crawshay *v.* Maule, 1 Swanst. R. 495, 506, 507; Peacock *v.* Peacock, 16 Ves. 49, 57; Ex parte Williams, 11 Ves. 3, 5; Ex parte Ruffin, 6 Ves. 119, 126, 127; Post, § 328, note; Murray *v.* Mumford, 6 Cowen, R. 441; Cruikshank *v.* M'Vicar, 8 Beavan, R. 106; Geortner *v.* Trustees of Canajoharie, 2 Barbour, R. 625.

[2] Gow on Partn. ch. 5, § 2, p. 231. — Substantially the same language was used by Lord Eldon, in Crawshay *v.* Collins, 15 Ves. 226. See also Natusch *v.* Irving, Gow on Partn. App. p. 398, 404, 3d edit.

[3] Ante, § 97, and note 1; 1 Story on Eq. Juris. § 675, 676; Ex parte Ruffin, 6 Ves. 119, 126; Ex parte Williams, 11 Ves. 3, 5; Holderness *v.* Shackles, 8 Barn. & Cresw. 612; Kirby *v.* Schoonmaker, 3 Barbour, Ch. R. 46.

[4] Gow on Partn. ch. 5, § 2, p. 235, 236, 3d edit.

forced by Courts of Equity; and, through this right of the partners themselves, is worked out the known equity of the joint creditors, to have a priority of payment of their debts out of the same funds, in opposition and preference to the separate creditors of each partner.[1] It is easy to perceive, that this right would be a

[1] Ex parte Ruffin, 6 Ves. 119; s. c. Ante, § 97, note 1; Ex parte Fell, 10 Ves. 347; Allen v. Center Valley Co. 21 Conn. 130; Ex parte Williams, 11 Ves. 5. — In the latter case Lord Eldon said: "I have frequently, since I decided the case Ex parte Ruffin, considered it; and I approve that decision. In a subsequent case the dissolution took place only a week before the question arose; and the true question, I thought, was upon the *bona fides* of the transaction; whether that which had been joint estate, had become separate estate. The grounds upon which I went, in Ex parte Ruffin, were these. Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions; or, if there is a deficiency, to call upon each other to make up that deficiency, according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment; and may execute his judgment against the effects of the partnership. But, when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment; clearly, not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate, or create, an interest by suit. There are various ways of dissolving a partnership; effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or, as in this instance, a dry, naked agreement, that the partnership shall be dissolved. In no one of these cases can it be said, that to all intents and purposes the partnership is dissolved; for the connection still remains until the affairs are wound up. The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner. But still, in either of those cases, that community of interest remains that is necessary, until the affairs are wound up; and that requires, that what was partnership property before, shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require. And it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in

mere dead claim or inert title, if the mere dissolution of the partnership would of itself prevent the partners from applying the joint funds in an appropriate manner to those very purposes; at least if a Court of Equity did not interpose to enforce it. And why should a Court be called upon to do the very acts, which, upon principles of common sense and common justice, the partners themselves might reasonably be left to do for themselves, without such a dilatory and inconvenient process?

§ 327. Moreover, it is plain, that if a total extinction of all rights, powers, and authorities of the partners to deal with the partnership property, funds, and effects, immediately followed upon the dissolution of the partnership, it would amount to a complete suspension of all right and authority to apply any part thereof to the payment and discharge of the existing partnership debts, or to collect the debts due to the partnership, or to adjust unsettled accounts, or even to close any outstanding adventures, or inchoate operations. The mischiefs, therefore, would be positive and irreparable, without the intervention of a Court of Equity to compel the parties to do that, which the law has wisely allowed without compulsion, or to appoint a receiver, who should perform the like functions in a slow, and expensive, and, for the most part, a less active and skilful manner.

§ 328. Hence it is now the admitted doctrine of the common law, that although the dissolution of the partnership disables any one of the partners from contract-

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the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution." See also Gow on Partn. ch. 5, § 2, p. 235, 236, 3d edit.

ing new debts, or buying or selling or pledging goods on account of the firm, in the course of the former trade thereof; yet, nevertheless, it leaves every partner in possession of the full power (unless, indeed, upon the dissolution it has been exclusively confided and delegated to some other partner or person)[1] to pay and collect debts due to the partnership;[2] to apply the partnership funds and effects to the discharge of their own debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership; and to make due acquittances, discharges, receipts, and acknowledgments of their acts in the premises.[3] For all these acts, if done

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[1] 2 Bell, Comm. B. 7, ch. 2, p. 643, 644, 5th edit.; Gow on Part. ch. 5, § 1, p. 227, 228, 3d edit.; Id. ch. 5, § 3, p. 305, 306.

[2] [And the insolvency of one partner, and his misapplication of the funds collected, will not affect the validity of a *bonâ fide* payment to him by a debtor of the firm. Major *v.* Hawkes, 12 Illinois R. 298.]

[3] Collyer on Partn. B. 1, ch. 2, § 3, p. 75; Id. B. 2, ch. 2, § 8, p. 130; Id. B. 4, ch. 1, p. 582 to p. 588, 2d edit.; Fox *v.* Hanbury, Cowp. R. 445; Ide *v.* Ingraham, 5 Gray, 106; Milliken *v.* Loring, 37 Maine, 410; Harvey *v.* Crickett, 5 Maule & Selw. 336; Woodbridge *v.* Swan, 4 Barn. & Adol. 633; Smith *v.* Oriell, 1 East, R. 363; 1 Montagu on Partn. App. Note 2 M. p. 135; 2 Bell, Comm. B. 7, ch. 2, p. 643; Id. p. 637, 5th edit.; Combs *v.* Boswell, 1 Dana, R. 475; Murray *v.* Mumford, 6 Cowen, R. 441; Gannett *v.* Cunningham, 34 Maine, 62; Homer *v.* Irvine, 3 Watts & Serg. 345; Robinson *v.* Taylor, 4 Barr, R. 243. — In Harvey *v.* Crickett (5 Maule & Selw. 336 to 344), the question was much considered. On that occasion, Mr. Justice Bayley expounded the doctrine in the following manner: "If this action is maintainable, the consequence would be, that after an act of bankruptcy committed by one partner, the partnership-house must immediately be closed. But such a consequence is directly contrary to the cases of Fox *v.* Hanbury, and Smith *v.* Oriell. If several persons enter into partnership, either for a definite or an indefinite time, each partner is at liberty to apply the joint funds in payment of the partnership debts; and each has a lien on those funds for his own indemnity, limited to their being applied to the payment of partnership debts. When one of several partners becomes bankrupt, he puts himself by that act out of the partnership, and ceases to have any further control over the partnership

bonâ fide, are for the advancement and consummation of the great objects and duties of the partners upon

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property. The whole of his rights pass to his assignees. But this does not prevent the remaining partners from exercising the control, which rests with them over the property, to take care that it is duly applied in liquidation of the partnership debts. If this were not so, in what a situation would the solvent partners be placed? For if, in this case, a creditor had applied to M. B. Harvey for payment of a partnership debt, and he were precluded by the bankruptcy of J. W. Harvey from paying it, the consequence would be, that having funds of the partnership in his hands, fully sufficient to satisfy the demand, he must, nevertheless, become liable to arrest, and to be detained in prison. And the creditor also would be in this dilemma, that, having funds to look to for the discharge of his debt, he could not obtain payment, because he could not properly receive what the other was unable to pay. The solvent partner would say, that he was liable to account with the assignees of the bankrupt partner, and thus leave the partnership creditor unpaid. This seems to me to be a consequence, the inconvenience of which is sufficiently obvious. It is argued, that a distinction is to be made in the present case, because both M. B. Harvey and the defendants were aware of the act of bankruptcy. But I ask, whether this was not a *bonâ fide* payment to a person who is entitled to receive it? If it were, the knowledge which they possessed of the act of bankruptcy does not, as it seems to me, distinguish the case from those of Fox *v.* Hanbury, and Smith *v.* Oriell. In Smith *v.* Oriell, Lord Kenyon considered that the whole, and not a moiety only, of the partnership property, delivered by the solvent partner in satisfaction of a partnership debt, passed by the transfer." The other Judges concurred in his views. Mr. Bell (2 Bell, Comm. B. 7, ch. 2, p. 643, 5th edit.) has summed up the general doctrine, both as to authority and principle, in the following terms. "When a partnership expires, whether by death, or by lapse of time, or by bankruptcy, the partnership is considered, in one sense, as determined, but in a sense also as continued, that is, continued, till all the affairs are settled. After this no act can be effectually done, or contract entered into, in the name of the firm, as in partnership; but every act of administration, which is necessary for winding up the concern, may effectually be done. (1.) A receipt to a debtor of the company, by the signature of the firm, seems to be valid, if no other mode of settling the affairs has been appointed and make known. (2.) If by the dissolution and notice the debts are to be paid to a particular person, partner, or other receiver, no other can validly discharge the debt; especially if there be any evident marks of collusion; as paying by an offset against the partner, who grants the receipt. (3.) After disso-

the dissolution, to wind up the whole partnership concerns, and to divide the surplus, if any, among them,

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lution, no valid draft, acceptance, or indorsation, can be made by the firm; and it is no authority to do so, if one partner is in the notice empowered to receive and pay the debts of the company. The indorsation, draft, or acceptance, must be done by all the partners, or by one especially empowered so to act for them. (4.) If after dissolution a partner accept a bill in the name of the company, bearing date before the dissolution, it has been held in England, that the other partners are not bound. But a distinction has been taken, where, before the dissolution, skeleton or blank bills have been signed by the firm, and those are filled up subsequently to the dissolution, but a date inserted prior to the dissolution; in that case the bill has been held effectual to bind the partners. Such a case occurred in Scotland, but it has not yet been decided, in which, after the dissolution, it appeared that certain skeleton bills, which the company had been in use of granting, were filled up and antedated, so as to fall within the period of partnership." [On the other hand, in Buckley *v.* Barber, 1 Eng. Law & Eq. R. 511, Baron Parke said — "In our law the rule of the civil law does not exist with respect to agents of deceased principals; and with respect to surviving partners, though there are expressions of text-writers (Story on Partnership, § 344; 3 Kent, Comm. Lect. 43, p. 63), and judges (Harvey *v.* Crickett, 5 Mau. & S. 336; see Woodbridge *v.* Swann, 4 B. & Ad. 636; Beck *v.* Beck, 3 Swanst. 627; Lord Nottingham's MS., and 1 Id. 507, note), which have that aspect, there is no clear, satisfactory authority that the surviving partner has a power, by virtue of the partnership relation only, to transfer the legal title to the share belonging to the executors of the deceased, to a third person, leaving the executors to pursue their remedy against the survivor, if that authority is improperly exercised. It is clear that the legal title to the share of the survivor passes, and the purchaser therefore is at all events tenant in common with the executor; and as the law allows no right of action to one tenant in common against another, so long as the subject of the tenancy exists, and is capable of recaption, that circumstance will explain all the decisions on the subject, including Harvey *v.* Crickett, 5 Mau. & S. 336; see Woodbridge *v.* Swann, 4 B. & Ad. 633. In Harvey *v.* Crickett, the *dicta* of the judges go much further; probably Mr. Justice Bayley mistook the opinion of Lord Kenyon in Smith *v.* Oriell, 1 East, 368, and we doubt whether surviving partners have a power to sell, and give a good *legal* title to the share belonging to the executors of the deceased partner, when they sell in order to pay the debts of the deceased and of themselves; but, be that as it may, we think it clear, that the survivors could have no power to dispose of it otherwise than to pay such

after all debts and charges are extinguished.[1] In cases of the dissolution of a partnership by the death of one of the partners, the same rights and duties (as we shall presently see) attach to the surviving partners. The survivors are entitled to close up the affairs of the firm, to collect and adjust the debts due to it, and to pay its debts and discharge its liabilities. They are also bound to apply the partnership property to the like purposes with reasonable diligence. If they are negligent in the discharge of their duties in these particulars, Courts of Equity will interfere, and, upon the application of the representatives of the deceased partner, appoint a receiver, and order a sale of the partnership property, and wind up the affairs of the firm.[2]

§ 329. And, here, is seen the beneficial operation of the jurisdiction of Courts of Equity. While they will protect each partner in the due exercise of these rights and authorities, notwithstanding a dissolution; they will, on the other hand, watch over and guard the interests of the partnership itself, and take care that he shall not, by any misconduct, or abuse, or excess in the exercise of his own rights and authorities, prejudice those of the other partners. Hence, Courts of Equity

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debts, certainly not to mortgage that share together with their own (for that is the real nature of this transaction), as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade. At all events, therefore, this transaction was not within the scope of any implied authority which the surviving partners may have, to wind up the affairs of the partnership; and therefore this conveyance did not pass the share of the deceased to the plaintiffs, by virtue of any implied authority in the survivors."]

[1] Note, Ibid.; Drury v. Roberts, 2 Md. Ch. Dec. 157.

[2] Ibid.; Evans v. Evans, 9 Paige, R. 178; Post, § 344.

will interfere and prohibit and control, by an injunction, any improper sale or other misapplication of the funds of the partnership by any partner to the payment of his own private and separate debts. So they will, in like manner prevent him from subsequently trading with the partnership funds; or from interfering injuriously with the settlement of the partnership affairs; or from excluding the other partners from their just share of the management thereof;[1] or from doing any other act, or making any use of the property of the partnership, inconsistent with the purpose of winding up the concerns thereof, in the manner most beneficial to all

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[1] Gow on Partn. ch. 5, § 2, p. 231, 232, 3d edit.; Harding *v.* Glover, 18 Ves. 281; Crawshay *v.* Maule, 1 Swanst. R. 507; Heathcote *v.* Hulme, 1 Jac. & Walk. 122, 128; Wilson *v.* Greenwood, 1 Swanst. R. 481; Dacie *v.* John, 1 McClell. R. 206; s. c. 13 Price, R. 446; Collyer on Partn. B. 2, ch. 3, § 5, p. 235; Id. B. 4, ch. 1, p. 579, 587, 509, 2d edit.; De Tastet *v.* Bordenave, Jacob, R. 516; 1 Story on Eq. Jurisp. § 671; Allen *v.* Kilbre, 4 Madd. R. 464. — Mr. Collyer (Collyer on Partn. B. 2, ch. 3, § 7, p. 245, note b) seems to think, that a Court of Equity would refuse an injunction to restrain the use of the partnership name by one partner after a dissolution; and he founds himself upon the doctrine of Lord Thurlow, in Ryan *v.* Mackmath (3 Bro. Ch. R. 15), that a Court of Equity would not decree a written instrument to be delivered up and cancelled, upon which no action could be maintained at law. Lord Thurlow's opinion upon the general doctrine seems now abandoned; and the contrary rule, as to written instruments, generally established. See Mr. Belt's note (1) to 3 Bro. Ch. R. 15; 2 Story on Eq. Jurisp. § 699, 700, 701, 702, and the cases there cited. But, as between partners, the doctrine of Lord Thurlow would seem (even if it were admissible in common cases) to be unsatisfactory, and inconsistent with sound principles; for every such use of the partnership name after the dissolution may expose the other partners to the hazard of a suit at law, and perhaps to a recovery against them, where actual knowledge of the dissolution could not be brought home to the holder, if it be a negotiable instrument. But see Webster *v.* Webster, 3 Swanst. R. 491, note, and Lewis *v.* Langdon, 7 Sim. R. 421. See also Ante, § 224 to § 227.

the parties.[1] If any partner has, after the dissolution, misapplied the partnership funds, and made profits thereby, he will be made accountable for all such profits; but the losses, if any, must be borne by himself.[2] [But if the partners of a solvent partnership agree to dissolve and divide their joint property, and to own their respective parts in severalty, neither has any remedy in equity against the other, and no lien on the other partner, because of his liability for the debts of the firm, or his payment of them.[3]]

§ 330. If it shall become expedient and proper more effectually to attain any or all of these purposes, Courts of Equity will appoint a manager or receiver to collect the partnership funds, and wind up the whole concern in the manner most beneficial to all the parties, either exclusive of all the partners, or by making one or more of them the exclusive managers or receivers. To induce Courts of Equity, however, to interfere in this last strong and summary manner, some fraudulent breach of contract or duty must be shown, or some urgent and pressing necessity.[4]

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[1] Crawshay *v.* Maule, 1 Swanst. R. 495, 507; Collyer on Partn. B. 2, ch. 2, § 1, p. 130, 2d edit.

[2] Ante, § 174, 233; Heathcote *v.* Hulme, 1 Jac. & Walk. 122, 128; Stoughton *v.* Lynch, 1 Johns. Ch. R. 467, 469, 471; Crawshay *v.* Collins, 15 Ves. 218; Gow on Partn. ch. 5, § 4, p. 354, 3d edit.; Brown *v.* Litton, 1 P. Will. 140; Brown *v.* De Tastet, Jacob, R. 284; 1 Valin, Comm. Lib. 2, tit. 8, art. 5, p. 578, edit. 1766; Willett *v.* Blanford, 1 Hare, R. 253, 263.

[3] Holmes *v.* Hawes, 8 Iredell, Eq. R. 21; Lingen *v.* Simpson, 1 Sim. & Stuart, 600; Hickman *v.* M'Fadden, 1 Swan, 258.

[4] Gow on Partn. ch. 2, § 4, p. 114; Id. ch. 5, § 2, p. 231, 232, 3d edit.; Harding *v.* Glover, 18 Ves. 281; Crawshay *v.* Maule, 1 Swanst. R. 507; Heathcote *v.* Hulme, 1 Jac. & Walk. 122, 128; Wilson *v.* Greenwood, 1 Swanst. R. 481; Dacie *v.* John, McClell. R. 206; De Tastet *v.* Bordenave, Jac. R. 516; Collyer on Partn. B. 2, ch. 3, § 6, p. 240 to p. 244;

§ 331. Courts of Equity proceed still further in the enforcement of their principles. If any partner, after the dissolution, should make any composition of the debts due to or from the partnership, he will not be at liberty to avail himself of any private benefit therefrom, but it will properly belong to the partnership; for whatever act he does, it is his duty to perform it not for his own personal advantage, but for the utmost advantage of the concern.[1] Hence, also, if, under an agreement for a lease for the partnership, one partner, after the dissolution of the partnership, should obtain the lease in his own name, he will be restrained from disposing of it otherwise than for partnership purposes.[2] So fixed, indeed, is this duty still to continue to act for the benefit of the partnership, that no partner is allowed to claim any particular reward or compensation for his trouble or services, in thus assisting in the arrangement and winding up of the concerns thereof, unless it be specially stipulated.[3]

Id. B. 4, ch. 1, § 2, p. 579, 587, 588, 2d edit.; 1 Story on Eq. Jurisp. § 672; 2 Bell, Comm. B. 7, ch. 2, p. 645, 5th edit.; Ante, § 228, 229, 231.

[1] Collyer on Partn. B. 2, ch. 2, § 1, p. 130, 2d edit.; Beak v. Beak, 3 Swanst. R. 627; 1 Story on Eq. Jurisp. § 316; Gow on Partn. ch. 5, § 2, p. 255; Crawshay v. Collins, 15 Ves. 218, 229; Beak v. Beak, Rep. Temp. Finch, 190; Ante, § 174 to § 186.

[2] Collyer on Partn. B. 2, ch. 3, § 5, p. 235, 2d edit.; Alder v. Fouracre, 3 Swanst. R. 489; Elliott v. Brown, 4 Swanst. 489, note; Gow on Partn. ch. 5, § 4, p. 349, 3d edit.; Ante, § 174 to § 186.

[3] Ante, § 182; Collyer on Partn. B. 2, ch. 2, § 1, p. 130, 2d edit.; Id. B. 2, ch. 2, § 2, p. 151; Heathcote v. Hulme, 1 Jac. & Walk. 122; Wittle v. McFarlane, 1 Knapp, R. 312. — On this last occasion (which was an appeal from Jamaica) the Master of the Rolls (Sir John Leach) said: "It is impossible to maintain the charge for commission, because it is in truth a charge by a partner for the collection of a partnership debt. How can a partner charge commission against a partner for the collection of a partnership debt, in which both of them are interested? It is a misappre-

§ 332. The French law has, to a certain, but not to the full extent, adopted these doctrines of the common law. It treats the dissolution of the partnership, in whatever way it may happen, when brought to the knowledge of the partners, as a virtual determination of their powers to act for the partnership in any future operations; unless, indeed, so far as may be necessary to complete acts and concerns already entered into on account of the partnership, but incomplete and in progress at the time of the dissolution. These are treated as matters of positive and indispensable obligation; and they, therefore, may be finished by the same partner who was authorized to begin and complete them.[1] And this is but following out the precept of the Roman law, which required, in such cases, where the dissolution was occasioned by the death of one partner, that the business begun by him should be completed by his heir. *Hæres socii, quamvis socius non est; tamen ea, quæ per defunctum inchoata sunt, per hæredem explicari debent.*[2]

§ 333. But in other respects the French law does not seem to have followed out this just policy, and these enlarged principles of the common law, as to the rights of the partner upon the dissolution of the

hension entirely, and there does not appear any pretence for saying that there is any local usage in the island to sanction such a charge. If commission cannot be charged, of course interest upon commission cannot be charged. The Court will, therefore, refer it back to the Court below, with a declaration, that no commission could be charged, either for the collection of the debts of first or second partnership." See also Franklin v. Robinson, 1 Johns. Ch. R. 158; Bradford v. Kimberley, 3 Johns. Ch. R. 434; Caldwell v. Lieber, 7 Paige, 483; Thornton v. Proctor, 1 Anst. 94; Burden v. Burden, 1 Ves. & Beam. 170; Caldwell v. Lieber, 7 Paige, 483.

[1] Pothier, De Société, n. 155, 156.

[2] Dig. Lib. 17, tit. 2, l. 40; Pothier, Pand. Lib. 17, tit. 2, n. 59.

partnership. On the contrary, it seems silently, if not submissively, to have followed out the dictates of the Roman law on the subject of mandates or agency, and the powers of partners;[1] so that the dissolution of the partnership, in any manner whatsoever, is held to amount to a revocation of the implied powers and authorities of each partner, any further to administer the concerns of the partnership, as the delegate or agent of the others. Accordingly, Pothier lays it down as clear, that, immediately after notice of the dissolution of the partnership, the power of each partner to act as the administrator thereof ceases; and even a payment to one partner of the debts due to the partnership will be invalid, if the debtors have notice of the fact of the dissolution at the time of such payment.[2] Nay, the doctrine is pressed further; and if the partnership expires by its own limitation, or by mere efflux of time, the like payment will be invalid, even without such notice; because (it is said) those, who have any business with a partnership, ought to inform themselves of the tenure or duration of that partnership.[3] So that, in fact, from the time of the dissolution, the partners become tenants in common of the property engaged in the partnership; and if the whole belonged to one, he is forthwith entitled to the whole profits and proceeds thereof.[4] They can no longer proceed to administer the same separately; and all that they can do is to require either an amicable

[1] Ante, § 95, 102, 109, and note 5; Story on Agency, § 425 to 429; Pothier, de Societé, n. 156, 157.

[2] Pothier, De Societé, n. 157; Id. n. 155, 156.

[3] Pothier, De Societé, n. 157.

[4] Pothier, de Societé, n. 158, 160; Civil Code of France, art. 1865, 1872.

and voluntary adjustment, and settlement, and division of the partnership concerns; or, in default thereof, to apply to the proper tribunal for that remedial justice which is required to accomplish the same purpose. Each, therefore, has in effect an action or suit, like that of the Roman action, *Pro socio*, or the Roman action, *Communi dividendo*.[1] Indeed, as we have seen, the Roman law did not, during the continuance of the partnership, clothe any partner, unless the power was specially delegated to him, with the power to administer the entire concerns and business of the partnership, or with any power to dispose of any part of the property thereof, except his own particular share.[2]

§ 334. The foregoing considerations apply to the effects and consequences, as between the partners themselves, of a voluntary dissolution by their own mere act or will, or in conformity to their original stipulations. Let us, then, in the next place, proceed to consider the effects and consequences of such a dissolution in relation to third persons. And, here, the preceding statements, respecting the liabilities of partners to third persons,[3] will greatly abridge whatever might otherwise have been appropriate in this place. In the first place, the dissolution of a partnership, whether it be by the voluntary act or will of the parties, or by the retirement of a partner, or by mere efflux of time, will not in any manner change the rights of third persons, as to any past contracts and transactions with, or on account of the firm; but their

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[1] Pothier, de Societé, n. 161 to 180; Civil Code of France, art. 1872; Ante, § 223, 230.

[2] Ante, § 95, 102, 109, and note 5; Story on Agency, § 425 to 429.

[3] Ante, § 126 to 168.

obligation and efficacy and validity will remain the same, and be binding upon the partnership in the same manner, as if no dissolution had taken place.[1] In the next place, such a dissolution will not absolve the partners from liabilities to third persons, for the future transactions of any partners, acting for or on account of the firm, unless some one or more of the following circumstances occur. (1.) That the third persons dealing with, or on account of the firm, have due notice of the dissolution;[2] or, (2.) That they have had no transactions whatsoever with the firm until after the dissolution;[3] or, (3.) That the partnership was not general, but limited to a particular purchase, adventure, or voyage, and terminated therewith before the transaction took place;[4] or, (4.) That the new transaction is not within the scope and business of the original partnership;[5] or, (5.) That it is illegal, or fraudulent, or otherwise void from its defective nature or character;[6] or, (6.) That the partner, sought to be charged, is a dormant partner, to whom no credit was actually given, and who retired before the transaction took place.[7]

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[1] Collyer on Partn. B. 1, ch. 2, § 3, p. 75, 2d edit.; Ault v. Goodrich, 4 Russ. R. 430; Gow on Partn. ch. 5, § 2, p. 240, 241, 3d edit.

[2] Ante, § 160 to 164; Collyer on Partn. B. 1, ch. 2, § 2, p. 74, 2d ed.; 2 Bell, Comm. B. 7, ch. 2, p. 638 to 640, 5th edit.; Gow on Partn. ch. 1, p. 20; Id. ch. 5, § 2, p. 240, 248 to 251, 3d edit.; Watson on Partn. ch. 7, p. 384, 385, 2d edit.; National Bank v. Norton, 1 Hill (N. Y.), R. 572; Conro v. Port Henry Iron Co., 12 Barbour, 27.

[3] Ante, § 160, 161. But see 2 Bell, Comm. B. 7, ch. 2, p. 641, 642, 5th edit. See also Parkin v. Carruthers, 3 Esp. R. 248.

[4] Ante, § 280, 321, 322, 323.

[5] Ante, § 126, 127, 128, 130.

[6] Ante, § 130, 131, 132; Id. § 6.

[7] Collyer on Partn. B. 1, ch. 2, § 2, p. 74, 2d edit.; Id. B. 3, ch. 3, § 3, p. 370, 371; Evans v. Drummond, 4 Esp. R. 89; Brooke v. Enderby,

§ 335. The same rule as to the necessity of notice is adopted in the French law. And accordingly Pothier says, that if traders and artisans, who have been accustomed to furnish supplies to a partnership, continue, in good faith, after the dissolution of the partnership, of which they are ignorant, to furnish the like supplies to one of the partners on account of the partnership, all of the partners and their heirs will be bound therefor.[1] It is observable, that Pothier puts, by implication, the very qualification which is insisted on in the preceding section; for he confines the liability to the cases of persons, who had, before the dissolution, been accustomed to deal with the partnership. The same result, however, would probably arise in all cases, where, notwithstanding the dissolution, the partners should still hold themselves out as partners, either expressly, or by allowing their names to stand openly as a part of the firm.[2]

§ 336. In respect to the necessity of such a notice, the cases of a voluntary dissolution of the partnership, in any of the ways abovementioned, differ essentially from the cases of a dissolution by the death, or the bankruptcy (duly declared by public proceedings) of one or more of the partners; for, in these latter cases, no notice whatsoever is necessary to be given of the dissolution to third persons, in order to exempt their estates from all responsibility for the acts and contracts of the other partners; since the partnership is thereby

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2 Brod. & Bing. R. 71; Heath v. Sansom, 4 Barn. & Adol. 177; Gow on Partn. ch. 4, § 2, p. 251, 3d edit.; Ante, § 159.

[1] Pothier, de Societé, n. 157.

[2] Ante, § 160, 161; Williams v. Keats, 2 Starkie, R. 290; Parkin v. Carruthers, 3 Esp. R. 248.

dissolved by mere operation of law.[1] The reason seems to be, that the parties are thereby either totally incapable of acting at all, or at least of binding their estates; and it is against public policy to allow the acts of the other partners to bind any persons, who are incapable either of acting at all, or of continuing any authority for such a purpose, or whose estates may otherwise be subjected to irreparable injury, or even to ruin. The same principle would probably be held to apply to other cases, creating by mere operation of law a positive incapacity; such as the marriage of a female partner, or the attainder of a partner of felony,[2] or the dissolution of the partnership by a public war.[3]

§ 337. With these brief remarks, we may dismiss the consideration of the effects and consequences of a dissolution of the partnership by the voluntary acts or stipulations of the partners, and may, in the next place, proceed to the consideration thereof in cases of bankruptcy.[4] Bankruptcy (as we have seen) puts an end

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[1] Collyer on Partn. B. 1, ch. 2, § 2, p. 74; Id. B. 3, ch. 3, § 4, p. 419, 2d edit.; Vulliamy v. Noble, 3 Meriv. R. 614; 2 Bell, Comm. B. 7, ch. 2, p. 638, 639, 5th edit.; Gow on Partn. ch. 5, § 2, p. 248; Id. ch. 5, § 4, p. 348, 3d edit.; Ante, § 162. — Perhaps, in the case of bankruptcy, the reason why notice is not positively required to be given after the declaration of the bankruptcy, is its supposed notoriety, and that all the world are bound to take notice of it. Certainly there is no pretence to say, that a mere secret act of bankruptcy, upon which no public proceedings have been or can now be had, will produce the like effect, unless notice be given. See Lacy v. Woolcott, 2 Dowl. & Ryl. R. 458. See Ante, § 313; 2 Bell, Comm. B. 7, ch. 2, p. 641, 5th edit.; Gow on Partn. ch. 5, § 3, p. 306, 3d edit.; Thomason v. Frere, 10 East, R. 418; Franklin v. Lord Brownlow, 14 Ves. 550, 557, 558.

[2] Ante, § 303, 306.

[3] Griswold v. Waddington, 15 Johns. R. 57; s. c. 16 Johns. R. 438; Ante, § 303, 304, 306, 315.

[4] It is not within the scope or objects of these Commentaries to treat of the various topics, connected with the issuing of the commission in bank-

to the partnership by operation of law, and immediately, upon the due declaration thereof, by relation back from the time when the act of bankruptcy was committed.[1] From that period, therefore, the bankrupt ceases to have any power or dominion over his property and effects in the partnership; and it is transferred to the assignees, who are appointed under the commission, and they succeed to all his rights and interests therein.[2] From the same period also the assignees are deemed tenants in common with the other partners in all such property and effects, subject to the rights and claims of the other partners.[3]

§ 338. Another consequence, flowing directly from the preceding considerations, is, that all future actions at law, to be brought on account of the partnership property, or contracts, or rights, must be brought jointly in the names of the solvent partners, and the

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ruptcy, the proof of debts, and other proceedings thereon. They properly belong to a different Treatise, upon the practice in bankruptcy. The discussion of the subject of joint and several commissions in bankruptcy, and the proceedings thereon, seems also properly to belong to such a Treatise. Those who wish for more information thereon, can consult Collyer on Partn. B. 4, ch. 2, § 1 to 11, p. 595 to 678, 2d edit., and Id. B. 4, ch. 3, § 1 to 8, p. 686 to 718, and Gow on Partn. ch. 5, § 3, p. 256 to 348, 3d edit.

[1] Ante, § 313, 314; Gow on Partn. ch. 5, § 1, p. 227, 228, 3d edit.; Id. ch. 5, § 3, p. 305, 306, 307; Collyer on Partn. B. 4, ch. 1, p. 590, 591, 2d edit.; Barker v. Goodair, 11 Ves. 78; Dutton v. Morrison, 17 Ves. 193; In re Wait, 1 Jac. & Walk. 605; Thomason v. Frere, 10 East, R. 418.

[2] Ante, § 313, 314; 3 Kent, Comm. Lect. 43, p. 58, 4th edit.; Gow on Partn. ch. 5, § 1, p. 227, 228, 3d edit.; Id. ch. 5, § 3, p. 298, 299; Thomason v. Frere, 10 East, R. 418.

[3] Ante, § 313, 314; 3 Kent, Comm. Lect. 43, p. 58, 59, 4th edit.; Gow on Partn. ch. 5, § 3, p. 266, 267, 3d edit.; Id. ch. 5, § 3, p. 299, 305; Collyer on Partn. B. 4, ch. 1, p. 579, 580, 2d edit.; Holderness v. Shackels, 8 Barn. & Cresw. 612.

assignees of the bankrupt, who succeed equally to his rights of action, as well as to his rights of property; for the assignment not only transfers the property of the bankrupt, but also all his rights of action, to the assignees.[1] On the other hand, all actions at law by third persons against the partnership, may be, and, indeed, ordinarily should be, brought against all the partners, including the bankrupt; and the assignees should not in general be made parties thereto, since they are not liable thereto, but are to account only under the proceedings in bankruptcy.[2] The case may be, and often is, very different in suits in equity, brought by, or against the assignees.[3]

§ 339. On the other hand, from the time of the act of bankruptcy, and by relation thereto, the bankrupt becomes incapable of acting for, or binding the partnership by his acts; and in a general sense, and with few exceptions, all his acts become from henceforth void and inoperative. He cannot in any manner sell, or otherwise dispose of the partnership effects; he cannot contract debts or other engagements, binding on the partnership; and he cannot compel any payments to the firm, or give any receipt or release there-

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[1] Gow on Partn. ch. 5, § 3, p. 341, 342, 3d edit.; Collyer on Partn. B. 3, ch. 5, § 1, p. 471; Id. B. 4, ch. 1, p. 579; Id. B. 4, ch. 5, p. 696, 697, 701, 702, 2d edit.; Thomason v. Frere, 10 East, R. 418; Graham v. Robertson, 2 Turn. R. 282; Franklin v. Lord Brownlow, 14 Ves. 557; 1 Chitty on Plead. p. 27, 28, 6th edit.; Com. Dig. *Bankrupt*, D. 29.

[2] 1 Chitty on Plead. p. 62, 63, 6th edit.; Id. p. 104; Id. p. 176; Watson on Partn. ch. 8, p. 434, 2d edit.

[3] See Story on Eq. Plead. § 153 to § 158, 439; Cook's Bankrupt Law, Vol. 1, ch. 14, § 1, 2, 3, p. 553 to 561, 4th edit.; Gow on Partn. ch. 5, § 4, p. 352, 3d edit.; Bailey v. Vincent, 5 Madd. R. 48. — The full consideration of this subject properly belongs to a Treatise on Pleading, and is therefore omitted in this place.

for.[1] In respect to the other solvent partners, they also are, by the bankruptcy, disabled from engaging

[1] Ante, § 313, 314; Gow on Partn. ch. 5, § 1, p. 227, 228, 3d edit.; Id. ch. 5, § 3, p. 299, 304, 305, 306; Collyer on Partn. B. 4, ch. 1, p. 589, 590, 2d edit. — Mr. Gow has very well stated the general doctrine, and cited some cases to illustrate it. "We have seen (says he) in a former part of this work, that an act of bankruptcy committed by one partner, when followed by a commission, dissolves the partnership by relation to the time when the act of bankruptcy was committed. The partner, therefore, who has committed the act of bankruptcy, cannot afterwards communicate to strangers any rights, either against the firm, or the joint property; because the commission and assignment retrospectively deprive him of all capacity of acting. They determine his power to bind the firm by relation to the date of his bankruptcy, and all his rights, from that time, passing to his assignees, he ceases to have any further control over the partnership, or the joint property. And the statutes concerning bankrupts make an entire, not a partial avoidance of the bankrupt's acts, as well in respect of his partner's moiety as his own. Therefore, where a partner, on the eve of his bankruptcy, voluntarily deposited goods with a third person for a creditor of the firm, and the deposit falsely purported to be founded upon a supposed sale, the creditor, after the bankruptcy of the partner, having received information of the deposit, declared his acceptance of it; and in an action of trover by the assignees under a joint commission to recover the goods, it was held, that the creditor could not resist their claim, inasmuch as the deposit was not completed until after the bankruptcy of the party depositing, at which time the partnership was at an end. So, where two of three partners affecting, but without authority, to bind the firm, by deed assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards, by the direction of such correspondent, drew a bill of exchange in the name of the firm, upon his agent here, which was accepted, payable to their own order, for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt, and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned, the other partner being all the time abroad. It was held, that by such an indorsement of the bill by the two, after acts of bankruptcy committed by them, though before the commission issued, nothing passed to the creditor; for the bankrupt partners had, by relation, ceased, at the time of such indorsement, to have any control over the joint stock as partners, and therefore could not bind either the property of their assignees, or of their solvent partner." Gow on

in any new dealings in future on account of the partnership.[1] But in respect to past transactions, which were consummated at the time of the bankruptcy, they are not prevented from exercising a due control over the partnership effects, and of applying them *bonâ fide* to the payment and discharge of the partnership debts and obligations.[2]

§ 340. Indeed, so completely does the bankruptcy of one partner sever the joint rights and interests of the partnership, that even an execution, issued against the partnership effects, subsequently to the act of bankruptcy, will be invalid and inoperative upon those effects; for the act of bankruptcy overreaches the execution; and it is not competent for the execution creditors to disappoint the arrangements, made in bankruptcy, for the equal distribution of the effects of the partnership among all the creditors; since it would

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Partn. ch. 5, § 3, p. 304, 305, 306, 3d edit.; Hague *v.* Rolleston, 4 Burr. R. 2176; Thomason *v.* Frere, 10 East, R. 418. But see Lacy *v.* Woolcott, 2 Dowl. & Ryl. 458; Collyer on Partn. B. 4, ch. 1, p. 582 to 588, 2d edit. The exceptions to the general doctrine stand principally upon the statutes of bankruptcy, saving from the operation of the general rule *bonâ fide* contracts, and payments made by the bankrupt to and with persons who have no notice of the act of bankruptcy. Collyer on Partn. B. 4, ch. 1, p. 589, 590, 2d edit.

[1] Ante, § 313, 314; Gow on Partn. ch. 5, § 3, p. 306, 307, 3d edit.; Fox *v.* Hanbury, Cowp. R. 445; Harvey *v.* Crickett, 5 Maule & Selw. 336; Murray *v.* Murray, 5 Johns. Ch. R. 78; Hoxie *v.* Carr, 1 Sumner, R. 173; Collyer on Partn. B. 4, ch. 1, p. 587, 588, 2d edit.; Thomason *v.* Frere, 10 East, R. 418.

[2] Ante, § 325 to 328; Gow on Partn. ch. 5, § 1, p. 227, 228, 3d edit.; Collyer on Partn. B. 4, ch. 1, p. 579 to 588, 2d edit. — It seems that the assignees of the bankrupt are clothed with the like reciprocal rights and authorities. Collyer on Partn. B. 4, ch. 1, p. 578, 579, 580, 2d edit. See also Gow on Partn. ch. 5, § 3, p. 298, 299, 300, 3d edit.; Id. p. 308, 309.

defeat the just policy of the bankrupt laws.[1] The subject of the due administration of the partnership assets, and other incidental topics, will hereafter occur in another connection, when we come to treat of the final adjustment and settlement, and winding up of the partnership concerns.

§ 341. As to the solvent partners, in case of the bankruptcy of one or more of the partners, it is clear, that they retain all their original rights, powers, and authorities over the management of the concerns of the partnership, excepting only, that they are not at liberty any further to carry on the business of the partnership, or to make any new contracts or other engagements, or to incur any liabilities on account thereof, or to employ the capital stock in trade. If they do, it will be a violation of duty, and at their own risk; and they may, at the option of the assignees, be compelled to account for the profits, if any are thereby made, or be charged with interest upon the share of the bankrupt, and they must bear all the losses.[2] [Neither

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[1] Collyer on Partn. B. 4, ch. 1, p. 590, 591, 592, 2d edit.; Gow on Partn. ch. 5, § 3, p. 308, 309, 3d edit.; Barker v. Goodair, 11 Ves. 78; Dutton v. Morrison, 17 Ves. 193; In re Wait, 1 Jac. & Walk. 605.

[2] Collyer on Partn. B. 2, ch. 3, § 4, p. 221 to 227, 2d edit.; Gow on Partn. ch. 5, § 3, p. 306 to 308, 3d edit.; Crawshay v. Collins, 15 Ves. 218; s. c. 2 Russ. R. 325; Brown v. De Tastet, Jacob, R. 392; Ante, § 325 to 328. — In Brown v. De Tastet (Jacob, R. 295), Lord Eldon used the following language: "The Master in the execution of the decree has, I am informed, proceeded upon the case of Crawshay v. Collins. In that case, three persons, Collins, Noble, and Boughton, carried on the business of pump and engine manufacturers in partnership together. In 1804, a commission of bankrupt issued against Noble, and in 1805 the bill was filed by his assignees, claiming three eighths of the profits of the business, which remained unaccounted for at the time of the bankruptcy, or which had accrued since, and also of two patents, and the profits derived from them. The question, therefore, was, whether the assignees of Noble were entitled to the same relief, that he himself would have been entitled to, if he had not become a

has the solvent partner an absolute legal right to the sole administration of the assets; although a Court of Equity would ordinarily appoint him receiver, if his capacity and integrity were unquestioned.[1]] But the solvent partners have a lien upon the partnership property and effects for the payment of all the debts and charges due by the partners, as well as for their own distribu-

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bankrupt; a bankruptcy dissolving a partnership in the same manner as death, in this respect only, that assignees have rights somewhat similar to those which the representatives have, where the partnership is dissolved by death. It was argued, that in both cases the demand to be made by the representatives of a deceased partner, or the assignees of a bankrupt, was limited to that sum of money, which, if the account had been taken at the dissolution, would have been found due from the surviving or solvent partner, leaving all the property in their hands. On the other hand, it was argued that, in many cases, that could not be the law; for instance, if immediately after the bankruptcy, all the stock, which in that case consisted of manufactured goods, pumps, and such things, had been sold for a sum of money, three eighths of which would have been more than what was due to the bankrupt, taking the account as matter of debt, then the assignees, being certainly tenants in common till the stock was converted, and the identical stock being sold, and three eighths of it yielding more than what was due to the bankrupt at the time of his bankruptcy, as the calculated value, what pretence could there be for saying that the assignees should not have a proportion of what it sold for? But it is asked, Will you say, that in all cases, where there is a partnership, such is to be the consequence of carrying on the business, that the profits shall be divisible in the same way as if the partner had not died, or had not become bankrupt? I say, no; I do not mean to say, that it will be so in all cases; but on the other hand, I will not deny that it may be the law in some cases. The general principle, I should say, ought to be this; that, as it is quite competent to the parties to settle the accounts and to mark out the relation between themselves, as creditors or debtors, so where there is a non-settlement of the account (though a settlement may sometimes introduce great hardships and difficulties), yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency or bankruptcy, have no right to say that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it."

[1] Hubbard *v.* Guild, 1 Duer (N. Y.), 662.

tive share of the surplus.[1] They may, therefore, notwithstanding the act of the bankruptcy of the partner is known to them, proceed, *bonâ fide*, to make payments out of the partnership funds in discharge of the joint debts and other obligations of the partnership;[2] although, if they are guilty of any excess, in this particular, injurious to the rights of the assignees, they may be restrained by an injunction by a Court of Equity.[3]

§ 342. In the next place, then, as to the effects and consequences of a dissolution by the death of one of the partners. This subject may properly be considered under two aspects; (1.) As to the partners themselves; (2.) As to third persons. In the first place, as to the partners themselves. And, here, the remark already made becomes important; that a partnership is not, strictly speaking, either a joint-tenancy or a tenancy in common; and that it is an universally established principle of the whole commercial world, that the property and effects thereof do not belong exclusively to the survivors; but they are to be distributed between them and the representatives of the deceased, in the same manner as they would have been upon a voluntary dissolution *inter vivos*.[4] In short, the universally acknowledged maxim on this subject is: *Jus accrescendi inter mercatores pro beneficio commercii locum non habet*.[5] The maxim has been since expanded, and is now constantly construed, so as to embrace all sorts of partner-

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[1] Ante, § 326.

[2] Collyer on Partn. B. 4, ch. 1, p. 582 to 589, 2d edit.; Harvey *v.* Crickett, 5 Maule & Selw. 336; Ante, § 325 to 328, 339, and note.

[3] Ante, § 224, 225, 329, 341, and note (1), p. 488.

[4] Ante, § 89, 90.

[5] Co. Litt. 182, a.

ships between two or more persons for their joint account and benefit, whether they are merchants or not, and whatever may be the nature of the trade, or business, or employment, in which they are engaged.[1]

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[1] Ante, § 90; Jeffrey *v.* Small, 1 Vern. R. 217. [In a late case in the Exchequer, it was extended to manufacturers and to trade fixtures. Baron Parke, in a learned judgment observed, — "In the earlier books we do not find any trace of the doctrine of survivorship *inter mercatores*, in chattels, but some against the now admitted doctrine of survivorship as to remedies or choses in action. The first cited is from the Year Book, 38 Edw. 3, 7, tit. 'Accompt' (which is the authority mentioned in Br. Ab., 'Joint-tenants,' pl. 11). There Kirton (a serjeant) arguing that in an action of account against a bailiff of two (not merchants), the executors of both ought to join, says, that if two merchandise in common, the executors of each shall have a moiety, so they ought in the case of an *action*. But Knyvet, J., says, 'It is not alike of a chattel in possession and a chattel in action, for the action cannot be severed, and his executors cannot join in the action with the other who survived.' The language indeed is 'l'aut ne poit my est' seve,' but l'aut seems a false print — it may, however, mean the 'other,' or 'latter,' *i. e.* the chose in action. It is afterwards said that the writ, which was by the executors of the survivor, was adjudged good; and a sentence is added, which must be either a misprint, or refer to the right of *action* — it is said, 'and this is the law of two merchants who have goods in common; if one die, the other shall have the whole by survivor.' The next authority is Lord Coke, 1 Inst. 182 a, who puts the joint wares and merchandise, *debts* and *duties*, of merchants on the same footing, and so does Noy, 55; and it is argued, that if they be on the same footing, as the remedy clearly survives, the title to the chattels does also. But Lord Coke clearly means, in the case of merchants, not to allow a survivorship in both wares and duties, but to disallow it in each; and it was afterwards made a question, notwithstanding what is said in the Year Book, 38 Edw. 3, whether the survivor and executor of the deceased ought not to join in an action for a chose in action in the lifetime of the deceased. It was held by the Court, in Hall *v.* Huffam, 2 Lev. 188, in consideration of the authority of Lord Coke in this passage, that they ought to join in an action for goods sold by two joint merchants; also, there is a precedent in Lutw. 1493, of an action by the executors of a joint merchant joining with the survivor for taking the goods of the partnership in the life of the deceased. Subsequently, in the case of Martin *v.* Crompe, 1 Ld. Raym. 340; 1 Salk. 444, it was held to be clear, in accordance with the doctrine in the Year Book, 38 Edw. 3, that the right of action of two merchants survived, that the survivor should take the whole, and account to the administrator of the deceased, and that the administrator could

§ 343. We have already seen, that a dissolution by death puts an end to the partnership, from the time of

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not join; for Lord Holt said that it would make strange confusion, that one should sue in his own right, and the other in another's; and it has been undoubted law, ever since that decision, that the *remedy* survives. Lord Eldon, in Ex parte Ruffin, 6 Ves. 126, says, that in the law of merchants, the legal title in some respects, in all the equitable title, remains, notwithstanding the survivorship; and the same doctrine was acted upon in the Court of King's Bench, in the case of Rex *v.* The Collector of the Customs at Liverpool, 2 M. & S. 223, which case proceeded entirely on the ground that the legal title did not survive in the case of a partnership in ships. On the other hand, the authority is very slender, that the title survives at law, and that the executor of the deceased person can only claim in equity. The most direct is a note of Lord Tenterden's, in his Treatise on Shipping (p. 97), in which it is said, the rule 'Jus accrescendi inter mercatores locum non habet,' is only enforceable in a Court of Equity, — but there is no prior authority quoted for that position. Mr. Justice Story (p. 68, American edition of Abbott) says that this note was not written by Lord Tenterden, but that seems not to be the case, from a note of my brother Shee (n. 97, c. 3, 7th ed.). This note may have been founded on the authority of the doctrine in some equity reports where a Court of Equity has granted relief on survivorship. For instance, in Lake *v.* Gibson, 1 Ab. Ca. Eq. 291, the Master of the Rolls, Sir Joseph Jekyll, says, in all cases of a joint undertaking, either in trade *or any other dealing*, the joint owners are to be considered as tenants in common, and the survivors as trustees for those who are dead: but this observation follows a statement respecting a joint purchase of land, where the difference is pointed out between purchasing in equal shares, where there is a survivorship, and where the portions are not equal where there is none; in equity, however, the legal estate may survive at law. The latter indicates that the joint-tenants do not mean to have an equal chance of survivorship, but that one shall hold in trust for the other in proportion to his share. There is no dictum that there is a survivorship at law, in all cases, between merchants. A similar doctrine to that in Lake *v.* Gibson had been laid down before in Jeffrey *v.* Small, 1 Vern. 217, A. D. 1683, by Lord Keeper Guildford, who is evidently treating of equities only, and who states the rule of equity to be, that if two persons are joint-tenants, by gift or devise, there is a survivorship; the parties are liable to all the consequences of the law; — but as to any joint undertaking, in the way of trade or the like, it was otherwise; and he decreed that the plaintiff should be relieved. The *dicta* of judges in some subsequent cases were cited, which admit of the same explanation. Lord Eldon, indeed, in Crawshay *v.* Collins, 15 Ves. 227, speaking of partnership, says it determines 'by the death of one partner, in which case the

the occurrence of that event, whether known or unknown, or whether third persons have or have not

law says that the property survives to the others. It survives as to the legal title in *many* cases; but not as to the beneficial interest.' Now, if Lord Eldon is speaking of choses in action, it is perfectly correct, and it is by no means clear that he meant any thing more. Upon the whole, there is no satisfactory authority for the position that the title to partnership chattels survives at law, and the authorities the other way greatly predominate. It may be added that Mr. Justice Story on Partnership, § 342, treats it as the universally acknowledged rule, that upon the dissolution of the partnership by death, the property and effects thereof do not belong exclusively to the survivors, but they are to be distributed between them and the representatives of the deceased, in the same manner as they would have been upon a voluntary dissolution *inter vivos*. We consider, therefore, that the first point made on the part of the plaintiffs ought to be decided against them. The next question is, whether the same law which excepts the goods of *merchants*, for the benefit of commerce, from the general law of joint-tenancy, extends to those of *manufacturers*. At a very early period the term 'merchant' was very liberally construed — it was held to include shopkeepers. 2 Brownl. 99. The same principle of the encouragement of trade applies to manufacturers, in partnership and every other description of trade. Story, § 342. It is then said that it does not extend to fixtures. But trade fixtures, which are removable, are part of the stock in trade, and clearly fall within the rule as to partnership stock, and all these fixtures were of that character. Therefore we are of opinion that one third of the fixtures seized belongs to the executors of William, and that they would be seizable under an execution by *fi. fa.* against his executor *de bonis testatoris*, if there were no other circumstances in the case. But it was urged on behalf of the plaintiffs, that though the right to the chattels does not survive, the surviving partner or partners have of necessity a *jus disponendi*, for the purpose of winding up the partnership concerns, and that the conveyance by Abraham was within the scope of that authority, and transferred the legal title in all. In the civil law such a *jus disponendi* prevails, in the case of both agents and partners of deceased persons. 'Si vivo Titio, negotia ejus administrare cœpi: intermittere, mortuo eo non debeo: nova tamen inchoare necesse mihi non est: vetere explicare, ac conservare necessarium est: ut accidit, cum alter ex sociis mortuus est; nam quæcunque priori negotii explicandi causâ geruntur, nihilum refert, quo tempore consumentur, sed quo tempore inchoarentur.' Dig. lib. 3, tit. 5, l. 21, § 2. In our law, this rule does not exist with respect to agents of deceased principals; and with respect to surviving partners, though there are expressions of text-writers (Story on Partnership, § 344; 3 Kent's Comm. Lect. 43,

notice thereof.[1] So that it completely puts an end to the power and authority of the surviving partners to

p. 63), and judges (Harvey *v.* Crickett, 5 Mau. & S. 336; see Woodbridge *v.* Swann, 4 B. & Ad. 636; Beck *v.* Beck, 3 Swanst. 627; Lord Nottingham's MS., and 1 Id. 507, note), which have that aspect, there is no clear, satisfactory authority that the surviving partner has a power, by virtue of the partnership relation only, to transfer the legal title to the share belonging to the executors of the deceased, to a third person, leaving the executors to pursue their remedy against the survivor, if that authority is improperly exercised. It is clear that the legal title to the share of the survivor passes, and the purchaser, therefore, is at all events tenant in common with the executor; and as the law allows no right of action to one tenant in common against another, so long as the subject of the tenancy exists, and is capable of recaption, that circumstance will explain all the decisions on the subject, including Harvey *v.* Crickett, 5 Mau. & S. 336; see Woodbridge *v.* Swann, 4 B. & Ad. 633. In Harvey *v.* Crickett the *dicta* of the judges go much further; probably Mr. Justice Bayley mistook the opinion of Lord Kenyon in Smith *v.* Oriell, 1 East, 368, and we doubt whether surviving partners have a power to sell, and give a good *legal* title to the share belonging to the executors of the deceased partner, when they sell in order to pay the debts of the deceased and of themselves; but, be that as it may, we think it clear, that the survivors could have no power to dispose of it otherwise than to pay such debts, certainly not to mortgage that share together with their own (for that is the real nature of this transaction), as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade. At all events, therefore, this transaction was not within the scope of any implied authority which the surviving partners may have, to wind up the affairs of the partnership; and therefore this conveyance did not pass the share of the deceased

[1] Ante, § 319, 336. — There seems to be an exception as to the necessity of such a notice, when the surviving partners or one of them are executors of the deceased partner; for then, in order to exonerate his estate from future liability, it is said, that due notice ought to be given of his death to the creditors of the firm, because in the absence of such notice, the executor partner, in his character of personal representative of the deceased, has power to bind his estate. Vulliamy *v.* Noble, 3 Meriv. R. 614. But is this doctrine maintainable, except in cases where the usual articles of agreement authorized the executor to carry on the partnership? What authority otherwise can he have to bind the testator's estate?

carry on for the future the partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof.[1] It is, therefore, the duty of the surviving partners henceforth to cease altogether from carrying on the trade or business thereof;[2] and if they act otherwise, and continue the tradé or business, it is at their own risk, and they will be liable, at the option of the representatives of the deceased partner, to account for the profits made thereby,[3] or to be charged with interest upon the deceased partner's share of the surplus, besides bearing all the losses.[4]

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to the plaintiffs, by virtue of any implied authority in the survivors." Buckley *v.* Barber, 1 Eng. Law & Eq. R. 506.]

[1] Gow on Partn. ch. 5, § 4, p. 351, 352, 3d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 637, 638, 643, 644; 3 Kent, Comm. Lect. 43, p. 63, 4th edit.

[2] See Travis *v.* Milne, 9 Hare, 141.

[3] See Chambers *v.* Howell, 11 Beavan, 6, when they will not be liable for profits.

[4] See Willett *v.* Blandford, 1 Hare, R. 253; Collyer on Partn. B. 2, ch. 1, § 1, p. 79, 2d edit.; Id. B. 2, ch. 3, § 4, p. 221 to 226; Booth *v.* Parks, 1 Molloy, R. 465; Crawshay *v.* Collins, 15 Ves. 218; s. c. 2 Russ. R. 325; Brown *v.* Litton, 1 P. Will. 224; Ogden *v.* Astor, 4 Sandf. 311; Goodburn *v.* Stevens, 1 Md. Ch. D. 420; Hammond *v.* Douglas, 5 Ves. 539; Brown *v.* De Tastet, Jacob, R. 284, 292; Heathcote *v* Hulme, 1 Jac. & Walk. 122; 3 Kent, Comm. Lect. 43, p. 64, 4th edit.; Ante, § 329. — Where an election is made to have a decree for a share of the profits, there it would seem that the surviving partners are, or at least may be, entitled to all just allowances and deductions, and even to ne compensation for their skill and personal services. Lord Eldon, in awshay *v.* Collins (2 Russ. R. 345), said: "And I cannot bring myself to think, that, if it be clearly made out, that a business is carried on with the property, which belonged to a deceased partner, for instance, by the surviving partner, and no particular circumstances occur to vary the rule, the mere accident of one man surviving the other can authorize him to say, 'I shall carry on the trade by the application of the funds of the partnership, at the hazard of the funds of the partnership, and I shall have the whole of the profits, and you shall have no share of them.' There may, undoubtedly, be occasion for making claims in the nature of

§ 344. But here, also, the same qualifications and limitations of the doctrine already stated, with reference to the rights, duties, powers, and authorities of the partners, in cases of a dissolution by voluntary consent, or by efflux of time, or by bankruptcy, apply to cases of the surviving partners.[1] Although, as to future dealings, the partnership is terminated by the death of one partner; yet for some purposes it may be said to subsist, and the rights, duties, powers, and authorities of the survivors remain, so far as is necessary to enable them to wind up and settle the affairs of the partnership.[2] And the ordinary rule is, that upon the dissolution of a partnership by death, the surviving parties are entitled to close up the affairs of the firm.[3] They have, therefore, a right to receive the debts due to the partnership, and, on the other hand, to apply the partnership assets and effects in discharge of the debts and other obligations due by it.[4] However,

just allowances; but I cannot bring myself to think, that the interest, which at law survives in a continuing partnership, survives in such a sense as to cut down the rule of equity, and that the continuing partners shall have to account for nothing, but the value of what the share was at the time of the death or bankruptcy of the other partner. Even if you were to lay down the rule, in that way, still you would have to ask yourself, how is that value to be ascertained? It cannot be done by the surviving partner choosing to say, 'I shall take it at such a value.' There must be some way of valuing it, so as to give the party retiring the complete value; and there must be some way, in which this Court will direct that valuation to be made." See also the remarks of the same learned Judge in Crawshay *v.* Collins, 15 Ves. R. 218, 226, 227, 228, and 2 Russ. R. 345, cited Ante, § 322, note (1), and Ante, § 343, note (2); Gow on Partn. ch. 5, § 2, p. 254, 3d edit.; Id. ch. 5, § 4, p. 355; Collyer on Partn. B. 2, ch. 3, § 4, p. 226, 228, 229, 2d edit.

1 Ante, § 324 to 328.

2 Evans *v.* Evans, 9 Paige, R. 178; Ante, § 328 *a*.

3 Evans *v.* Evans, 9 Paige, R. 178.

4 Ante, § 325 to 328, 341; 2 Bell, Comm. B. 7, ch. 2, p. 637, 638, 643,

if there be any danger of abuse or positive misapplication of those funds by the surviving partners, a Court of Equity will interpose, and restrain it by injunction, and even appoint a receiver, upon the application of the representatives of the deceased.[1]

§ 345. And, here, we have an analogous rule promulgated in the Roman law in the case of agency, as well as in the case of partnership. *Si, vivo Titio negotia ejus administrare cœpi, intermittere, mortuo eo, non debeo. Nova tamen inchoare necesse mihi non est; vetera explicare ac conservare necessarium est; ut accidit, cum alter ex sociis mortuus est. Nam quæcunque prioris negotii explicandi causa geruntur, nihilum refert, quo tempore consummentur, sed quo tempore inchoarentur.*[2]

§ 346. One of the consequences, then, of a dissolution of a partnership by death (under the qualification and limitations above suggested) is, that the personal representatives of the deceased become tenants in common with the survivors of all the partnership property and effects in possession.[3] We say, the partnership property

644, 5th edit., and § 328, note (2), where the language of Mr. Bell is cited. Collyer on Partn. B. 2, ch. 2, § 2, p. 130, 2d edit.; Wood *v.* Braddick, 1 Taunt. R. 104; Hutchinson *v.* Smith, 7 Paige, R. 26; Evans *v.* Evans, 9 Paige, R. 178. See Buckley *v.* Barber, 1 Eng. Law & Eq. R. 511.

[1] Gow on Partn. ch. 5, § 2, p. 230, 231, 3d edit.; Id. ch. 5, § 4, p. 356, 357; Phillips *v.* Ackerson, 2 Br. Ch. R. 272, and Mr. Belt's note; Collyer on Partn. B. 2, ch. 3, § 4, p. 226, 2d edit.; Id. B. 2, ch. 3, § 5, p. 235; Id. B. 4, ch. 1, p. 588; Hartz *v.* Schrader, 8 Ves. 817; Estwick *v.* Coningsby, 1 Vern. R. 118; Burden *v.* Burden, 1 Ves. & Beam. 170; 3 Kent, Comm. Lect. 43, p. 63, 4th edit.; 2 Bell, Comm. B. 7, ch. 2, p. 645, 5th edit.; 1 Story, Eq. Jurisp. § 672; Ante, § 228, 231; Evans *v.* Evans, 9 Paige, R. 178.

[2] Dig. Lib. 3, tit. 5, l. 21, § 2; Pothier, Pand. Lib. 3, tit. 5, n. 50.

[3] Gow on Partn. ch. 5, § 4, p. 351, 3d edit. — What, properly speaking, constitutes partnership property, has been already in part considered, and will occur again incidentally in another connection hereafter. The subject as to the good-will of an establishment, and of the right to use the firm name

and effects in possession; for there is at the common law a material distinction between such property and effects in possession, and *choses in action*, debts, and other rights of action, belonging to the partnership. The latter, at law, belong to the surviving partners; and they possess the sole and exclusive right and remedy to reduce them into possession; although, when so recovered, the survivors are regarded as trustees thereof, for the benefit of the partnership, and the representatives of the deceased partner possess, in equity, the same right of sharing and participating in them, which the deceased partner would have possessed, if he had been living.[1]

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by the surviving partners, after the death of one partner, has been already adverted to. Ante, § 98 to 100, and note 4, Ibid.; Lewis *v.* Langdon, 7 Sim. R. 421.

[1] Gow on Partn. ch. 5, § 4, p. 348, 358, 3d edit.; Martin *v.* Crompe, 1 Ld. Raym. 340; Collyer on Partn. B. 3, ch. 5, § 2, p. 471, 2d edit.; Id. § 2, p. 474, 2d edit.; 1 Story, Eq. Jurisp. § 676, 677; 2 Bell, Comm. B. 7, ch. 2, p. 637, 638, 643, 644, 5th edit.; Wilson *v.* Soper, 13 B. Monroe, 411.— There is nothing in this doctrine peculiar to cases of partnership; for the same rule applies to cases of several obligees, covenantees, and other joint contractees, having a joint interest in the contract; for, in every such case, upon the death of one, the action must be brought in the name of the survivors. Collyer on Partn. B. 3, ch. 5, § 1, p. 471, 472, 2d edit. And, reciprocally at law (for it is different in equity), an action lies solely against the survivors, at the suit of third persons, for any debt or other obligation due by the partnership. Collyer on Partn. B. 3, ch. 3, § 4, p. 404 to 413, 2d edit.; 1 Story, Eq. Jurisp. § 676, 677, 679, 680; Scholefield *v.* Heafield, 7 Sim. R. 667; Gow on Partn. ch. 5, § 4, p. 351, 352, 3d edit.; Id. p. 356, 357, 358. Mr. Gow (p. 358, 359, 3d edit.) has assigned the technical reasons for this doctrine (which seems not known in the Roman law, or in the modern law of continental Europe), as follows: "The right of action must necessarily survive; otherwise, according to the technicalities of law, there would be a failure of justice; for the rights of the executor and of the survivor being of several natures, if they joined in the same suit, there consequently must be several judgments, which in a single action is not allowed. Substantially, however, the right of the representative of the deceased is not varied by this legal anomaly; for, there being no survivorship in point of interest, the instant any joint chose in action is reduced into possession by

However, the representatives of the deceased partner cannot, strictly speaking, be deemed partners with the survivors. But still a community of interest subsists between them, which is necessary for the winding up of the affairs of the partnership, and requires that what was partnership property before, shall continue so, for the purpose of being applied to the discharge of all the proper debts and obligations thereof, and for a final distribution of the surplus, according to the rights and shares of all the partners.[1]

§ 347. It may be further remarked, that, as it becomes the duty of all the parties in interest, upon a dissolution

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the legal process of the survivor, the right of the representatives to their distributive portion attaches. So, with respect to joint contracts entered into by a firm, and from which a joint legal responsibility results, it can at law, after the death of one partner, be enforced against the survivor alone, and finally against the representatives of the last survivor; for the law considers partnership contracts which are joint in form, as producing only a joint obligation, which, on the death of one, attaches exclusively upon the survivor. Indeed, the reason, which has been advanced, as operating to prevent personal representatives from asserting, jointly with the survivor, a right resulting to the partnership firm, applies with undiminished force, if a right accruing to a stranger from the firm should be attempted to be enforced against them and the survivor. Executors or administrators, if legally responsible, could only contract such a responsibility by the assumption of their representative characters; and it therefore follows, that they could only be charged *de bonis testatoris*, whereas the surviving partner would be liable *de bonis propriis*. So that the judgments must be different, as they applied either to the survivor, or to the representatives of the deceased partner. And little inconvenience arises from the present rule; for, notwithstanding the surviving partner is liable for the whole debt in the first instance, he can call upon the executor of his copartner for a contribution. Nor is there any hardship upon the creditor, since, in the event of the insolvency of the surviving partner, we shall presently see that he has a remedy in equity against the estate of the deceased."

[1] Gow on Partn. ch. 5, § 4, p. 351, 3d edit.; Ex parte Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. R. 480; Crawshay *v.* Maule, 1 Swanst. R. 506; Beak *v.* Beak, 3 Swanst. R. 627, App.; 2 Bell, Comm. B. 7, ch. 2, p. 637, 638, 643, 644, 5th edit.; 3 Kent, Comm. Lect. 43, p. 63, 4th edit.; Ante, § 325 to 328; Evans *v.* Evans, 9 Paige, R. 178.

by death, with all practicable diligence to wind up and settle the partnership concerns, to pay the partnership debts and obligations, and to distribute the surplus among those who are entitled to it, according to their respective shares therein, each party in interest has a right, in case of any improper delay, or danger of loss, or neglect of duty, to require the aid of a Court of Equity to enforce the duty, and to compel a full account and settlement of the whole concern.[1] Hence the personal representatives of the deceased partner have a right to insist upon the application of the joint property, in the hands of the survivors, to the payment of the joint debts, and a division of the surplus.[2] And as this can ordinarily be done only by a sale and conversion of the property into money, they are entitled to have the property sold for this purpose.[3] And if within a reasonable time the survivors do not account with them, and come to a settlement, a Court of Equity will entertain a bill for this purpose, and will, in aid thereof, if necessary, restrain the partners by injunction from disposing of the joint property, and from collecting the outstanding debts.[4] So, the surviving partners have each against the others a like right to insist upon a final adjustment and settlement of the partnership accounts, and a distribution of the surplus; but in such a suit the personal representatives of the deceased part-

[1] Evans *v.* Evans, 9 Paige, R. 178. — A bill of this sort strongly resembles the action, *pro socio*, of the Roman law, which was designed to effect the same and other purposes. 2 Bell, Comm. B. 7, ch. 2, p. 646, 5th edit.; Pothier, Pand. Lib. 17, tit. 2, n. 30 to 53; Pothier, de Société, n. 161.

[2] Ex parte Ruffin, 6 Ves. 126; Gow on Partn. ch. 5, § 4, p. 352, 3d edit.

[3] Evans *v.* Evans, 9 Paige, R. 178.

[4] Gow on Partn. ch. 5, § 4, p. 352, 3d edit.; Hartz *v.* Shrader, 8 Ves. 317; Ante, § 329 to § 344; Collyer on Partn. B. 2, ch. 3, § 4, p. 226, 227, 2d edit.

ners are necessary parties; for they have an equal interest therein with the survivors, and would not be concluded by any decree made in the premises, unless they were made parties.[1]

§ 348. In taking the account between the partners

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[1] Gow on Partn. ch. 5, § 4, p. 352, 3d edit.; Collyer on Partn. B. 2, ch. 3, § 4, p. 226, 227, 2d edit. — Mr. Bell (2 Bell, Comm. B. 7, ch. 2, p. 645) has summed the general results of the dissolution of the partnership, and the mode of settlement of the partnership concerns, as follows: "Until the final settlement of the partnership affairs, and the payment of the joint debts, and distribution of the joint property, it cannot correctly be said, that the partnership is determined. (1.) On the dissolution of partnership, the property is common, to be divided according to the shares of the partners after the payment of debts. This consists of the following particulars: — (1st.) The stock in trade, as originally contributed, with all the additions made to it. (2d.) Real estates acquired by the company; leases of premises for the use of the company; ships purchased or freighted on time. (3d.) The good-will of a mercantile or literary establishment seems to form a part of the common stock. (2.) The partners, or either of them, may insist on a sale as the best criterion of the value of the property; and this the Court may order, without waiting the final adjustment of interests, where it is manifest that there must be a dissolution. (3.) The common property thus converted, with the pecuniary funds when collected, forms a fund, over which the creditors of the concern have a primary and preferable claim; and it must be so applied, in the first place, before any partner, or his assignee or representatives, can claim a share. (4.) In taking an account between the partners themselves, the state of the stock is to be taken as at the dissolution (death for instance), and the proceeds thereof until it is got in; and each is to be allowed whatever he has advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out more than his just proportion. The partners are to be allowed equal shares of the profit and stock, if there be no other arrangement settled. But a different arrangement may be established either by contract or by the books and usage of the company. (5.) The surviving partners are to wind up the affairs, unless some fault or abuse is chargeable against them, or some danger from their intromissions, which may require the appointment of a neutral person, or the requisition of caution. (6.) The same confidence, which was placed in the partner, is not necessarily reposed in his representatives; and, therefore, where both or all the partners die, the Court will appoint a receiver."

upon any dissolution, each, of course, becomes chargeable with all the debts and claims, which he owes, or is accountable for, to the partnership; with all interest accruing upon the same debts and claims; and with all profits, which he has made out of the partnership effects during the partnership, or since the dissolution, either rightfully or by misapplication thereof.[1] Similar provisions existed in the Roman law, which are laboriously collected by Pothier, in his edition of the Pandects;[2] and from that law they have been transferred into the modern law of France.[3]

§ 348 *a*. If any partner has made advances to the firm, and others have received advances from it, these do not constitute debts, strictly speaking, until the concern is wound up, but only as items in the account between the partners.[4]

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[1] Gow on Partn. ch. 5, § 12, p. 255, 356, 3d edit.; Id. § 3, p. 302, 303; Id. § 4, p. 355; Collyer on Partn. B. 2, ch. 2, § 1, p. 122, 123, 2d edit.; Id. B. 2, ch. 3, § 4, p. 221, 222; Ante, § 329, 341, 343; Burton *v.* Wookey, 6 Madd. R. 367; Brown *v.* Litton, 1 P. Will. 224; Crawshay *v.* Collins, 15 Ves. 218, 220.

[2] Pothier, Pand. Lib. 17, tit. 2, n. 35 to n. 45.

[3] Pothier, de Societé, n. 167; Id. n. 109 to n. 132.

[4] Richardson *v.* Bank of England, 4 Mylne & Craig, 165, 172. — On this occasion Lord Cottenham said, speaking of debtor and creditor partners: "But though these terms 'creditor' and 'debtor' are so used, and sufficiently explain what is meant by the use of them, nothing can be more inconsistent with the known law of partnership than to consider the situation of either party as in any degree resembling the situation of those whose appellation has been so borrowed. The supposed creditor has no means of compelling payment of his debt; and the supposed debtor is liable to no proceedings either at law or in equity, assuming always that no separate security has been taken or given. The supposed creditor's debt is due from the firm of which he is a partner; and the supposed debtor owes the money to himself in common with his partners; and, pending the partnership, equity will not interfere to set right the balance between the partners. Indeed it could not do so with effect, inasmuch as immediately after a decree has enforced payment of the money supposed to be due, the party paying might, in exer-

§ 349. In respect to the mode of taking the accounts between the partners, that must depend upon circumstances. If the partners have by the articles of partnership provided a particular mode, that will be held to furnish the true rule for the adjustment of the concern, and the winding up of all the affairs thereof; unless the partners, by their own acts and conduct, have waived, or abandoned it; for, in that event, the stipulation in the articles, as to the mode, will be held a nullity.[1] In the absence, however, of any positive stipulations, or the abandonment of them by the acts and conduct of the parties, Courts of Equity, as

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cise of his power of a partner, repossess himself of the same sum. But if, pending the partnership, neither law nor equity will treat such advances as debts, will it be so after the partnership has determined, before any settlement of account, and before the payment of the joint debts or the realization of the partnership estate? Nothing is more settled than that, under such circumstances, what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither party has any remedy against, or liability to, the other, for payment from one to the other, of what may have been advanced or received. In Crawshay *v.* Collins, Lord Eldon says, 'Where a sum is advanced as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered as a debtor for the excess.' The money drawn out by any partner ceases to be part of the joint stock, so that, upon bankruptcy, the joint creditor cannot recall it, unless there had been a fraudulent abstraction; Ex parte Younge. Again, in Foster *v.* Donald, Lord Eldon says, 'If a partner, as partner, receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in.'" Ante, § 229.

[1] Ante, § 192; Gow on Partn. ch. 5, § 4, p. 353, 354, 3d edit.; Jackson *v.* Sedgwick, 1 Swanst. R. 460, 469; Pettyt *v.* Janeson, 6 Madd. R. 146; 2 Bell, Comm. B. 7, ch. 2, p. 645, 647, 648, 5th edit.

between the partners, will commence with the last stated account between them; and deem that conclusive upon all antecedent transactions, unless, indeed, some gross and palpable error or fraud can be shown.[1] If there has not been any stated account or any positive or implied settlement at any period, then, of course, the accounts must be taken from the period of the commencement of the partnership.[2] If profits have accrued since the death of the partner, by the employment of the capital or otherwise, that will be treated as an accession to the capital, and as joint property subject to all just allowances and deductions.[3]

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[1] Ante, § 206.

[2] Ante, § 206, 207, 347; Gow on Partn. ch. 5, § 4, p. 354, 355, 3d edit.; Beak *v.* Beak, Rep. Temp. Finch, 190; s. c. 3 Swanst. R. 627; Collyer on Partn. B. 2, ch. 2, § 2, p. 144, 145, 2d edit.; Id. B. 2, ch. 3, § 4, p. 212, 213, 214.

[3] Willett *v.* Blanford, 1 Hare, R. 253, 265; Ante, § 329, 341, 343, and note (1); Gow on Partn. ch. 5, § 4, p. 354, 356, 3d edit.; Brown *v.* Litton, 1 P. Will. 140; Hammond *v.* Douglass, 5 Ves. 539; Crawshay *v.* Collins, 15 Ves. 218, and Hill *v.* Burnham, and Coxwell *v.* Bromet, cited there, p. 220, 223; Brown *v.* De Tastet, Jacob, R. 284; Burden *v.* Burden, 1 Ves. & Beam. 170; Collyer on Partn. B. 2, ch. 3, § 1, p. 165, 2d edit.; Id. B. 2, ch. 3, § 4, p. 221, 222; 2 Bell, Comm. B. 7, ch. 2, p. 647, 648, 5th edit. — Many other matters, connected with the taking of the accounts between the partners, arise incidentally in the course of the adjustment, under the direction of Courts of Equity; such, for example, as the allowance of interest for or against partners for advances made to or by them; [see Ante, § 182 *a*]; so for separate debts due from the other partners to one partner. These and many similar questions will be found discussed in other elementary treatises; but they are not within the scope of the present Commentaries, which do not purport to deal with the minute details fit for the consideration of an accountant. See on this subject, Gow on Partn. ch. 2, § 4, p. 105, 106, 3d edit.; Id. ch. 5, § 3, p. 236; Id. ch. 5, § 4, p. 356, 357, 358; Collyer on Partn. B. 2, ch. 3, § 4, p. 200, 212, to p. 221, 229, 230, 231, 2d edit.; Beacham *v.* Eckford, 2 Sandford, Ch. R. 116. Mr. Collyer has well remarked (p. 214): "In taking the partnership accounts, it is mainly to be considered, what was the value of the joint property, and what the amount of the joint debts at the time of

§ 350. Another question which ordinarily arises between the partners in cases of a dissolution by

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the dissolution; what was the share of the retired, deceased, or bankrupt partner, in the joint property; whether, and to what extent, the joint capital has been employed, or joint debts incurred, since the dissolution; whether any of the joint property in specie has been sold since the dissolution; if so, what the gross amount, and what the interest of the profits; on the other hand, whether any of the joint property in specie having been sold, the profits have been applied to the purchase of other property in specie; and generally, whether, and to what extent, the joint property has been traded with since the dissolution. These, with many other considerations bearing on each particular case, must be duly weighed in the arrangement of complicated partnership accounts. And it may here be remarked, that the account is founded on the same principles, in whatever manner the dissolution may have taken place; whether, therefore, the affairs are to be adjusted between the remaining and retiring partner, the surviving partner and the executors of the deceased partner, or the solvent partner and the assignees of the bankrupt partner." The following remarks of Vice-Chancellor Wigram, in Willett *v.* Blanford (1 Hare, R. 253, 269, 270, 271, 272), deserve to be here cited as to the mode in which profits are to be shared which are made after the death of one partner, as showing that no universal rule can be laid down. "The circumstances of some cases would almost exclude the possibility of making a decree in any other form than that which the plaintiffs claim in this case. Take, for example, the case suggested by Lord Eldon, in Crawshay *v.* Collins, of the mere conversion into money, at a large profit, long after the testator's death, of the very property which belonged to the partnership at his death, and no other circumstance to embarrass the question. Again, the dissolution of a partnership *primâ facie* prevents new contracts being made on the joint account of the partners; but it necessarily leaves the old contracts of the partnership to be wound up. In the absence of circumstances to alter the case, it would be impossible to deny the right of the estate of a deceased partner to participate in the profits arising from winding up of the old concerns; and if, in such a case, the surviving partners should have so mixed up new dealings with the old, that the two could not be separated, the right of the estate of the deceased partner to share in the profits of the new dealings might unavoidably attach. In another case, a partnership may be formed, the substratum of which may consist of specific things of peculiar value in their use, as, for example, patents, the invention or property of one of the partners; and the profits made after the death of the patentee, or owner of the patent, may be derived wholly or principally from contracts subsisting at his death, but not wound up until long afterwards; or contracts entered

death (which is equally applicable, indeed, to other cases of dissolution), is, in what manner the partner-

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into after his death, of which contracts his specific property (the patents) may have been the media. In such a case, in the absence of special circumstances, it would be difficult to suggest a principle upon which the estate of the deceased partner should be refused the same proportion of the profits which he enjoyed in his lifetime. This appears to me to be the ground of the ultimate decision in Crawshay v. Collins. Again, the whole, or the substantial part, of a trade, may consist in good-will, leading to renewals of contracts with old connections. In such a case, it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the groundwork of Lord Eldon's reasoning, in Cook v. Collingridge. Circumstances may be suggested of a very different kind. Take the case of a business, in which profit is made by the personal activity and attention with which the use of the money capital is directed, and the case may require a different determination. Brown v. De Tastet; Featherstonhaugh v. Fenwick. Or, there may be the case of two persons being partners together, in equal shares; one finding capital alone, and the other finding skill alone; and suppose the latter, before his skill had established a connection or good-will, for the concern, should die, and the survivor, by the assistance of other agents, should carry on the concern upon the partnership premises, — it could scarcely be contended, after a lapse of years, that the estate of the deceased partner was entitled as of course to a moiety of the profits made during that lapse of time after his death; and if his estate would not be so entitled where the deceased partner had left no capital, it would be difficult to establish a right to a moiety only, because he had some small share of the capital and stock in trade engaged in the business at his death, without reference to its amount, and the other circumstances of the case. If, on the other hand, the skill of an individual, without capital, had been exercised as a partner in a concern, until it has created a connection and good-will, and, upon his death, his surviving partner, instead of giving to the estate of the deceased the benefit of that good-will by a sale of the concern, should think proper to carry on the concern for his own benefit until the connection and good-will were lost; it would not be difficult to justify a decree which, in such a case, should declare the estate of the deceased entitled to share any profits made after his death. If capital were to be taken as the basis upon which, in every case, the proportion of profits was to be calculated, much injustice would often ensue. In partnership cases, the agreed capital of a concern is considered in general as remaining the same, notwithstanding one partner may make advances to, and the other abstract money from the concern. If, at the death of an acting partner, he had abstracted or borrowed money from the part-

ship effects, and assets are to be divided, after all the charges and the debts and obligations due to third persons have been duly paid and discharged. In other words, how are the effects and assets, whether real, personal, or mixed, to be valued, so as to make an equal distribution of them among the partners, according to their respective shares thereof. In relation to the real estate of the partnership, it seems to have been generally considered, that it ought to be decreed to be sold, as the only fair and just way (in the absence of any other agreement between the parties) to ascertain its true value.[1] The same rule would seem equally to apply to all cases of chattels and other personal property and effects, which are not capable in themselves of being exactly divided, without reference to their positive and absolute value.[2] As to

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nership exceeding the amount of his property in the concern, it would be any thing but justice to hold, as a rule of course, that his right to participate in the profits after his death should continue to the same extent as if his accounts with the partnership were adjusted, and he had given his time and attention to the business. The distinction also between capital and stock in trade, which forms so material a subject of consideration in Crawshay *v.* Collins, would often make it unjust to take the agreed amount of capital in partnership as a basis upon which to found a general rule applicable to the estate of a deceased partner. I consider myself, therefore, bound by authority and reason, to hold, that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties; and that I must have more information than I now possess before I can safely decide this case."

[1] Collyer on Partn. B. 2, ch. 3, § 4, p. 204, to 214, 2d edit.; Id. p. 214 to 216; Cook *v.* Collingridge, Jacob, R. 607; 2 Bell, Comm. B. 7, ch. 2, p. 632, 645, 5th edit.; 3 Kent, Comm. Lect. 43, p. 64, 4th edit.; Crawshay *v.* Collins, 17 Ves. 218, 227; Crawshay *v.* Maule, 1 Swanst. R. 495, 506, 523; Gow on Partn. ch. 5, § 2, p. 234, 235, 3d edit.

[2] Ibid.

chattels and other personal property, capable of such a division, the same rule, as to a sale, may not necessarily and under all circumstances apply. But the true doctrine of Courts of Equity on this subject would seem to be, in all cases, to decree a sale of the partnership property, rather than a division thereof in kind, whenever a sale would be most beneficial for the interests of all the partners.[1]

§ 351. The doctrine has sometimes been strenuously contended for, that upon the dissolution of the partnership by the retirement, or death, or bankruptcy of one partner, the others had a right to take the whole partnership property and effects at a valuation. But this doctrine has been completely repudiated by Courts of Equity, as equally unfounded in principle and public

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[1] Ibid.; Regden *v.* Pierce, 6 Madd. R. 353; Collyer on Partn. B. 2, ch. 2, § 2, p. 146, 147, 2d edit.; Id. B. 2, ch. 3, § 4, p. 206 to 211, 214, 215, 216. —Mr. Gow (Gow on Partn. ch. 5, § 2, p. 235, 237, 3d edit.; Id. p. 252, 253) insists upon the right of any partner to insist on a sale in all cases. He says (p. 234): "When the common property is ascertained, either partner may insist upon a sale of the whole concern. The rights of the partners respectively are then precisely equal; each may require the whole concern to be wound up by a sale, and a division of the produce. One partner has no claim upon his individual proportion of a specific article, nor can he insist upon an exclusive right in it; but he is entitled only to a general arrangement of the partnership concerns, and for that purpose to an account of the produce of the aggregate joint effects. He cannot separate his share from the bulk of the joint property, nor compel his copartner to accept what, according to a valuation, his interest may be worth. That is not the mode in which a Court of Equity winds up the concerns of a partnership. But in every case, in which that Court interferes in closing the transactions of a firm, it directs the value of the whole of the joint property, whether real or personal, to be ascertained, in the way in which it can be best ascertained, viz. by a sale and its conversion into money." In Freday *v.* Wightwick (1 Tamlyn's R. 261), Sir John Leach, Master of the Rolls, said: "It is a principle, that all property, whether real or personal, is subject to a sale on a dissolution of the partnership." Mr. Chancellor Kent lays down the same doctrine in his Commentaries. 3 Kent, Comm. Lect. 43, p. 64.

policy.[1] In short, it would amount to a right of pre-eminence or superiority in some of the partners over

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[1] Gow on Partn. ch. 5, § 2, p. 234, 235, 3d edit.; Ante, § 350; Collyer on Partn. B. 2, ch. 3, § 4, p. 206 to 211, 2d edit.; Crawshay *v.* Collins, 15 Ves. 218, 227; Crawshay *v.* Maule, 1 Swanst. R. 495; Fox *v.* Hanbury, Cowp. R. 445; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Wilson *v.* Greenwood, 1 Swanst. R. 471; Cook *v.* Collingridge, Jacob, R. 607; Sigourney *v.* Munn, 7 Conn. R. 11. — In Featherstonhaugh *v.* Fenwick (19 Ves. 298, 309, 310), Sir William Grant said: "The next consideration is, whether the terms upon which the defendants proposed to adjust the partnership concern, were those to which the plaintiff was bound to accede. The proposition was, that a value should be set on the partnership stock; and that they should take his proportion of it at that valuation; or, that he should take away his share of the property from the premises. My opinion is clearly, that these are not terms to which he was bound to accede. They had no more right to turn him out, than he had to turn them out, upon those terms. Their rights were precisely equal; to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is, that, continuing to trade with his stock, and at his risk, they come under a liability for whatever profits might be produced by that stock." In Crawshay *v.* Collins, 15 Ves. 218, 227, Lord Eldon (after making the remarks already stated, Ante, § 322, note 1), added: "As to the case now before the Court, of the bankruptcy of one partner, supposing it the simple case of profit made by the mere sale of the property, there must be an account. It is said, a duty was imposed upon the assignees to call for the account. That is true. It is further urged, that they could not be traders in new adventures. That also is in a sense true. But the proposition would be rash, that there can be no case in which they could trade with consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know that other persons, with whom they might deal, could make the objection. The duty is not as between them and the other persons, who are not properly to be termed remaining or surviving partners; the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership; as if by effluxion of time, or by death, except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees. It is, however, no more the duty of the assignees to settle with the others, than it is their duty to settle with the assignees. Is it possible, then, to say, that upon any rule of law the other partners can take, as sole owners, all the houses, buildings, and stock in trade? The consequence of the destruction and dissolution of the partnership is, that they became tenants in common in each and every article embarked in it, under an obligation to deal with the whole of the stock, and every article, as the equitable title of the bankrupt and

the rest, upon any dissolution, to compel them to submit to a particular mode of selling their rights in the property, upon such terms as the others should choose to prescribe; a right utterly inconsistent with the acknowledged principles of the equality of rights and of powers and authorities of all the partners.[1]

§ 352. The Roman law, in like manner, contained provisions for the due settlement and distribution of the partnership effects, as, indeed, every system of jurisprudence must, which aims at any moderate administration of public or private justice. The action, *Pro socio*, seems properly to have applied to the due taking of the accounts of the partnership, and the action, *Communi dividundo*, to the distribution of the effects.[2] And certain rules were laid down, as to what charges and allowances were to be made for or against each partner, and the reciprocal rights, which each has against the others upon the final adjustment.[3] But a special enumeration thereof would rather be a matter of liberal curiosity,

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themselves requires; and, according to the case of Fox *v.* Hanbury, the right is not to an individual proportion of a specific article, but to an account; the property to be made the most of and divided." Mr. Collyer has summed up the general result of the cases in the following terms (p. 210): "It appears, therefore, that in all cases of partnership at will, whether the contract was originally of that nature, or has become so by effluxion of time or other circumstances, a Court of Equity will, upon a dissolution, decree a sale of the entirety of the partnership effects at the desire of any of the parties. And even in the case of a partnership with articles, supposing it to be dissolved for the misconduct of one partner, a case might be stated, where a Court of Equity would decree a general sale and account, as of a partnership at will, notwithstanding express provisions in the articles, as to the proceedings to be had upon a dissolution."

[1] Ibid.

[2] Dig. Lib. 10, tit. 3, l. 1 to 31; Id. Lib. 17, tit. 2, l. 52, 57, 65; Pothier, Pand. Lib. 10, tit. 3, n. 6; Id. Lib. 17, tit. 2, n. 33 to n. 54; Pothier, de Société, n. 161.

[3] Pothier, Pand. Lib. 17, tit. 2, n. 35 to 49; Domat, B. 1, tit. 8, § 5, art. 16.

than of practical utility or illustration of our jurisprudence.

§ 353. The French law also contains a minute enumeration of the mode of settling the accounts, and of making a distribution of the effects upon the dissolution of partnerships.[1] In some material respects, it

[1] Pothier, de Societé, n. 167 to 174. — Pothier says (166, 168): "Avant que de procéder au partage, on doit procéder au compte de ce, que chacune des parties doit à la communauté, qui est à partager, et de ce, qui lui est du par ladite communauté. On doit comprendre dans cet état, non-seulement ce qu'elle devoit à la société lors de sa dissolution, mais ce, qu'elle a pu devoir à la communauté depuis la dissolution, soit pour raison de ce qu'elle auroit retiré du fonds commun, soit pour raison du dommage, qu'elle auroit causé par sa faute dans les effets de la communauté. Pareillement on doit comprende dans l'état de ce, qui est du par la communauté à chacune des parties, non-soulement ce qui lui étoit du par la société lors de sa dissolution, mais ce qui a pu lui être du depuis par la communauté à cause des déboursés, qu'elle auroit faits inutilement pour les affaires communes, ou pour les biens de la communauté, depuis la dissolution de la société. On doit compenser jusqu'à due concurrence le montant des sommes dont chacune des parties est débitrice de la communauté, au montant de celles, dont elle est créanciere, et arrêter la somme dont elle se trouve, après cette compensation faite, débitrice de la communauté; ou celle, dont elle se trouve, après cette compensation faite, créanciere de la communauté. Observez que, dans le compte de ce, qui a été reçu ou mis pour la société, le livre de société tenu par l'un des associés, fait foi entre eux; Lauterbach. Après ce compte fait, on dresse la masse, c'est-à-dire, un état détaillé de toutes les différentes choses dont la communauté est composée; et on comprend dans cette masse, au nombre des dettes actives de la communauté, les sommes, dont quelques-unes des parties se sont trouvées, après la compensation faite, débitrices de la communauté; et au partage de la communauté, on la leur précompte, sur leur part. On dresse aussi un état des dettes passives de la communauté, et on y comprend les sommes, dont quelques-unes des parties se seroient trouvées au compte de la communauté, après compensation faite, créancieres de la communauté. Ces sommes doivent être par elles prélevées au partage de la communauté. Chacune des choses dont la communauté est composée, soit meubles, soit héritages, est portée dans cette masse pour une certaine estimation. Les parties peuvent faire elles-mêmes cette estimation, lorsqu'elles sont en état de la faire, qu'elles en sont d'accord, et qu'elles sont toutes majeures; sinon l'estimation se fait par un ou par plusieurs estimateurs dont elles conviennent; et si elles n'en peuvent convenir, le Juge du partage en nomme d'office."

agrees with our law; in others, again, it widely differs. It gives to every partner a right of action to enforce a due account and settlement; but it requires, in such a case, that all the partners should be parties to the suit; and if they are not, they may intervene, and make themselves parties.[1] If the partners have fixed a particular time after the dissolution for the account, that stipulation is to be followed. If there be no such stipulation, then an account is immediately demandable.[2] And so, indeed, is the rule of the Roman law. *Si convenit, ne omnino divisio fiat, hujusmodi pactum nullas vires habere manifestissimum est; sin autem, ne intra certum tempus, quod etiam ipsius rei qualitas prodest, valet.*[3] In these and in many other respects there is an agreement with our law.

§ 354. But the French law differs from our law in a striking manner, as to the mode of distribution of the partnership effects, whether they are movable, or immovable, or credits. It allows so much thereof to be sold, as may be necessary to discharge the debts and other obligations of the partnership.[4] But it does not authorize a sale thereof for any other purposes, unless it be by the express consent of all the partners, or it be the only mode by which practically a division of a part thereof can be made.[5] It provides, with these exceptions, that a valuation thereof shall be taken, either by agreement of the parties, or, if they disagree, by the proper judicial tribunal.[6] It further provides, that the

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1 Pothier, de Société, n. 162, 163.
2 Pothier, de Société, n. 165.
3 Pothier, de Société, n. 165; Dig. Lib. 10, tit. 3, l. 14, § 2.
4 Pothier, de Société, n. 169, 173.
5 Pothier, de Société, n. 169, 171.
6 Pothier, de Société, n. 168.

movable or personal property shall be valued, and divided among them all in kind (*en nature*); that for this purpose it shall be put into lots of equal value, the lots to be drawn by the partners;[1] that the real estate shall, in like manner, be valued and divided; and, as it rarely will admit of being put into lots of equal value, the value of each lot is to be ascertained, and the partner, who draws any lot beyond or short of his share, is to pay or receive the surplus to or from the other partners, who respectively have the corresponding lots.[2] As to debts due to the partnership, they are to be valued and divided in the like manner; that is, each partner is to have his own share of each of such debts.[3] But, inasmuch as great embarrassment must arise from each debtor's being thus obliged to pay each partner his share of the debts, a custom has prevailed of putting up into lots such of the debts as are good, and of dividing them by lot, in the same way as other effects.[4] As to debts due from the partnership to third persons, so far as they cannot be discharged by the application of the partnership effects, they also are divisible among all the partners, who thereby become liable *inter sese* to pay the same to the creditors; but the rights of the creditors against all *in solido* are not thereby varied.[5]

§ 355. It can scarcely escape observation, even from this brief enumeration, how much the rule of our Courts of Equity on this subject, by directing, in all cases of

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[1] Pothier, de Societé, n. 169.

[2] Pothier, de Societé, n. 170.

[3] Pothier, de Societé, n. 172.

[4] Pothier, de Societé, n. 172. — In this respect the French law coincides with that of the Roman law. Ea, quæ in nominibus sunt, non recipiunt divisionem. Cod. Lib. 3, tit. 36, l. 6; Dig. Lib. 10, tit. 2, l. 4; Pothier, Pand. Lib. 10, tit. 2, and tit. 3, n. 26; Pothier, de Societé, n. 172.

[5] Pothier, de Societé, n. 173.

real complexity or difficulty, a sale, instead of a distribution or division of the effects, excels that of the Roman and French law, in point of convenience, simplicity, and practical policy. The Scotch law has here also wisely abandoned the Roman law, and adopted the same rule of a sale as is adopted in our law.[1]

§ 356. We come, in the next place, to the fourth and last consideration under this head, viz. the effects and consequences of a dissolution of the partnership by a decree of a Court of Equity. And here, as between the parties themselves, there is little room for any additional observations, since precisely the same effects and consequences follow, as ordinarily apply to a voluntary dissolution by the partners, or to a dissolution by death. The only suggestion, which seems important in a practical view to be made, is, that where a bill is filed for this purpose, and it is clear to the Court, that a dissolution ought finally to be decreed, the Court will generally at once put an end to the partnership trade or business, by directing a sale by an interlocutory order or motion, where that measure is manifestly required by the interest of the parties, and otherwise a serious or irreparable mischief might ensue.[2]

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[1] 2 Bell, Comm. B. 7, ch. 2, p. 632, 633, 645, 5th edit.

[2] Gow on Partn. ch. 5, § 2, p. 235, 236, 3d edit.; Crawshay *v.* Maule, 1 Swanst. R. 506, 523; Nerot *v.* Burnard, 2 Russ. R. 56. See also Goodman *v.* Whitcomb, 1 Jac. & Walk. 569, 572.

CHAPTER XV.

DISSOLUTION — EFFECTS AND CONSEQUENCES AS TO THE RIGHTS OF CREDITORS.

§ 357. HITHERTO we have been mainly considering the effects and consequences of a dissolution as between the partners themselves and their representatives, and when and under what circumstances third persons, having no notice thereof, might, notwithstanding, have a remedy against all the partners upon subsequent transactions with some of the firm. We now come to the consideration of the rights of the creditors, who are such at or before the dissolution of the firm. These creditors may be either joint creditors of all the firm, or separate creditors of one or more of the firm. For the most part, the same considerations will apply to each class of creditors in all cases of distribution, whether by voluntary consent, or by mere operation of law, or by death, or by bankruptcy, or by the decree of a Court. There are, however, some particulars belonging to the case of bankruptcy, which will be reserved for a distinct and separate examination. But, unless some qualification is annexed, the doctrines hereinafter stated will generally apply to all other cases of dissolution.

§ 358. It has been already suggested, that the rights of antecedent creditors of the partnership are in no wise varied by the dissolution of the partnership.[1] It may

[1] Ante, § 334, 335; Ault v. Goodrich, 4 Russ. R. 430; Gow on Partn. ch. 5, § 2, p. 240, 241, 3d edit.; Collyer on Partn. B. 1, ch. 2, § 3, p. 75, 2d edit.; 2 Bell, Comm. B. 7, ch. 2, p. 638, 5th edit.

be added, that, upon the dissolution, it is competent for the partners, in cases of a voluntary dissolution, to agree that the joint property of the partnership shall belong to one of them; and if this agreement be *bonâ fide*, and for a valuable consideration, it will transfer the whole property to such partner, wholly free from the claims of the joint creditors.[1] The like result will arise from any stipulation to the same effect, in the original articles of copartnership, in cases of a dissolution by death, or by any other personal incapacity; but not in cases of a dissolution by forfeiture for felony, or by bankruptcy. The reason of this is obvious. While the partnership is solvent, and going on, the creditors have no equity, strictly speaking, against the effects of the partnership.[2] Neither have they any lien on the partnership effects for their debts. All that they can, or may do, is to proceed by an action at law for their debts against the partners; and having obtained judgment therein, they may cause the execution, issuing upon that judgment, to be levied upon the partnership effects, or upon the separate effects of each partner, or upon both.[3] There being, then, no lien, and no equity in favor of the creditors against the partnership effects, until such execution is issued and levied thereon, it follows, that those effects

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[1] Gow on Partn. ch. 5, § 2, p. 237 to 241, 3d edit.; Collyer on Partn. B. 2, ch. 1, § 2, p. 113, 114, 2d edit.; Ex parte Peake, 1 Madd. R. 346; Ex parte Ruffin, 6 Ves. 127; Ex parte Fell, 10 Ves. 347; Ex parte Williams, 11 Ves. 3; Ex parte Rowlandson, 1 Rose, R. 416; Campbell *v.* Mullett, 2 Swanst. R. 575; Ante, § 97, and note (1); Ante, § 326, note (1); Ketchum *v.* Durkee, 1 Barbour, Ch. R. 480; Sage *v.* Chollar, 20 Barb. 596; Bullitt *v.* Meth. Epis. Church, 26 Penn. St. R. 108.

[2] Ibid., and Ante, § 97, note, and Ante, § 326, note (1), and especially Ex parte Williams, 11 Ves. R. 3, 5; Waterman *v.* Hunt, 2 Rhode Island R. 298; Cook *v.* Beech, 10 Humph. 412.

[3] Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3; Ex parte Fell, 10 Ves. 347; Campbell *v.* Mullett, 2 Swanst. R. 552, 575.

are susceptible of being legally transferred, *bonâ fide*, for a valuable consideration, to any persons whatsoever, and as well to the other partners as to mere strangers.[1]

§ 359. And this is equally true, although the whole or a part of the consideration of the transfer is, that the partners taking the property shall pay the whole or a particular part of the debts of the partnership; for that will not aid the creditors. The reason is, that, in such a case, the retiring partner who so transfers his share, has no lien on the property for the discharge of those debts; for by his voluntary transfer thereof he has parted with it, and trusted to the personal security and personal contract of the other partners.[2] Even if he had, the lien would not pass to those creditors by operation of law, so as to become available in their favor.[3] There may be, and indeed often is, a special

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[1] Ex parte Ruffin, 5 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. R. 3, 5; Ante, § 97, and note; Ante, § 326, note (1); Campbell *v.* Mullett, 2 Swanst. R. 552, 575; Ex parte Fell, 10 Ves. 347; Ketchum *v.* Durkee, 1 Barbour, Ch. R. 480; Allen *v.* Center Valley Co., 21 Conn. 130; Ferson *v.* Monroe, 1 Foster, 462; Howe *v.* Lawrence, 9 Cush. 553.

[2] Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3, 5 to 8.

[3] Gow on Partn. ch. 5, § 2, p. 238 to 241, 3d edit.; Id. p. 245; Id. p. 253, 254; Collyer on Partn. B. 4, ch. 2, § 1, p. 603 to 605; Ex parte Peele, 6 Ves. 602; Ex parte Williams, Buck. Cas. 13; Ex parte Freeman, Buck. Cas. 471; Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3; Campbell *v.* Mullett, 2 Swanst. 552, 575; Ex parte Fell, 10 Ves. 347.—In Ex parte Williams (11 Ves. 3, 6), Lord Eldon said: "The creditors are not injured by the agreement of partners to dissolve the partnership; and that, from that time, what was joint property shall become the separate property of one, notice of the dissolution being given; as either a consideration is paid, or, which for this purpose is equal to a consideration, a covenant is entered into to pay the debts and indemnify the retiring partner, so conceived as not to leave any lien upon the property. Upon any other principle the conclusion must be, that a partner could not retire from Child's house; as the effects may be distributed twenty

agreement, subsequently entered into between the creditors and the partner, taking the transfer; but then the case stands dryly upon such an agreement, and has no operation beyond it.[1]

§ 360. Subject, however, to these exceptions, it may be generally stated, that, where the partners themselves have a lien upon the partnership effects for the discharge of all the debts and obligations thereof (as they have in all cases, where they have not parted with it),[2] that lien may, in many cases, be made available for the benefit of the creditors. But then the equities of the creditors are to be worked out through the medium of that of the partners.[3] They have, indeed, no lien; but

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years hence among the creditors, if they remain so. If creditors do not like the arrangement, they must go to each of the partners, and desire payment. Another material ground is, that, where the possession of the property is delivered over to the surviving partner, and he goes into the world as a sole trader, he has all the credit belonging to him as such sole trader; having the possession, and dealing with mankind as such. I qualify it so; for I do not agree, that mere dissolution will work all this effect; as that does no more than declare, that the partnership is not to be carried on any further, except for winding up the affairs, and he who has actual possession, has it clothed with a trust for the other, to apply the property to the debts; and that will qualify the nature of his possession, so that it cannot be said, he has the sole possession of the specific effects, or the debts, to bring it within the operation of the Statute of King James, which certainly affects debts."

[1] See Gow on Partn. ch. 5, § 2, p. 240, 245, 3d edit.; Id. p. 254, where the principal cases are collected.

[2] Ante, § 97, and note, and Ante, § 326; 1 Story, Eq. Jurisp. § 675, 676; Holderness *v.* Shackels, 8 Barn. & Cresw. 612.

[3] [And if the contract of partnership is of such a nature, that the copartners can enforce no such right of lien as between themselves, the partnership creditors can claim no such preference. Rice *v.* Barnard, 20 Verm. 480; Washburn *v.* Bank of Bellows Falls, 19 Verm. 278, and the able judgment of Redfield, Chancellor. In the late case of Tillinghast *v.* Champlin, 4 Rh. Is. R. 173, it was held that the doctrine of the text was applicable only while the copartners are administering their own affairs, and

(as has been said) they have something approaching to a lien, of which, with the assent of the partners entitled to the lien, they may avail themselves in a Court of Equity against the partnership effects.[1] The community of interest still remains, notwithstanding a dissolution, so far as is necessary to wind up the affairs of the partnership; and this requires, that what was partnership property before, shall (unless otherwise agreed), continue to be so for the purpose of a distribution, not as the rights of the creditors may suggest, but as the rights of the partners themselves require. And it is thus, through the operation of administering the equities between the parties themselves, that the creditors have the opportunity of enforcing this *quasi* lien.[2] In

did not apply, if one partner died, leaving the other insolvent, or when both partners become bankrupt, and their property is in the hands of assignees. But that in such a case an equitable lien would attach in favor of copartnership creditors upon joint property, and of separate creditors upon separate property, in the hands of the surviving partner, or assignees, as trustee for each class of creditors, which will be administered in equity against such trustees upon the direct application of the creditors. See the able opinion of Ames, C. J.]

[1] Campbell *v.* Mullett, 2 Swanst. R. 551, 575, 576; Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Fell, 10 Ves. 347; Ex parte Williams, 11 Ves. 3; Ante, § 97, note, and Ante, § 326, and note; 3 Kent, Comm. Lect. 43, p. 65, 4th edit.; Ex parte Kendall, 17 Ves. 514, 526. — In Ex parte Kendall (17 Ves. 526), Lord Eldon said: "I do not recollect an instance, that this right to go in upon the separate fund, not given by the legal contract, was extended beyond those who were creditors of the whole firm. Supposing that all those creditors could go in, the next question is, whether the creditors of the four can compel them to go in. With regard to that, though much artificial doctrine has been introduced in this Court, yet creditors, as such, independent of the effect of any special contract, have no lien or charge upon the effects of their debtor; and in all these cases of distribution of joint effects, it is by force of the equities of the partners among themselves, that the creditors are paid; not by force of their own claim upon the assets, for they have none."

[2] Ex parte Williams, 11 Ves. 3, 6; Ex parte Ruffin, 6 Ves. 119, 126, 127;

short, in case of a dissolution, each partner holds the joint property, clothed with a trust to apply it to the payment of the joint debts, and, subject thereto, to be distributed among the partners according to their respective shares therein.[1]

§ 361. From the foregoing considerations, then, it is plain, that the joint creditors of the partnership, while all the partners are living and solvent, can enforce no claim against the joint effects or the separate effects of the partners, except by a common action at law.[2] It is only in cases, where there is a dissolution by the death or bankruptcy of one partner, that the right of the joint creditors can attach, as a *quasi* lien upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners. In the former case (of death), the personal representatives of the deceased partner have a right (whether his estate be solvent or insolvent), to insist upon a due application of the joint effects, to pay the joint debts and fulfil the other purposes of the trust.[3] At law, in-

Ante, § 97, note; Ante, § 167; Ante, § 326, note (1); Ex parte Kendall, 17 Ves. 514, 526. See Stocken *v.* Dawson, 9 Beav. R. 246.

[1] Ibid. See Crallan *v.* Oulton, 3 Beavan, 1, 7.

[2] [In Allen *v.* The Center Valley Co., 21 Conn. R. 130, it was held, that although partnership creditors were entitled to priority of payment as against individual creditors, out of partnership funds, so long as they continued partnership funds, yet they have no specific lien thereon; and while the partnership remains, and its business is going on, whether insolvent or not, there is no legal objection to a *bonâ fide* distribution of the partnership funds among the members of the firm, or a *bonâ fide* change of them from joint to separate estate.]

[3] Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3, 6; Ante, § 97, note; Ante, § 326, 346, 347, note; Gow on Partn. ch. 5, § 2, p. 235, 236, 3d edit.; 1 Story on Eq. Jurisp. § 675, 676; Collyer on Partn. B. 3, ch. 3, § 4, p. 404, 405, 2d edit.; Id. B. 3, ch. 5, § 2, p. 503; 3 Kent, Comm. Lect. 43, p. 65, 4th edit.; Ex parte Kendall, 17 Ves. 313, 526; Wilcox *v.* Kellogg, 11 Ohio (Stanton) R. 394.

deed, the creditors have no remedy, except against the surviving partners for their debts;[1] but in equity, as we shall presently see, it is far otherwise. In the latter case (of bankruptcy) the like equity attaches to the solvent partners, and the assignees can stand only in the place of the bankrupt, and take his rights, and consequently they are entitled to nothing, except the surplus, after the discharge of all the joint debts, and of the claims of the other partners.[2] So that, in each case, it is plain, that the joint creditors must be paid, in order to the due administration of justice between the partners themselves. Thus, we see at once, how the *quasi* lien or equity of creditors arises, and that it is a dependent and subordinate right.

§ 362. Another important consideration in cases of a dissolution by death is, as to the rights of the joint creditors against the estate of the deceased partner. We have seen, that at [the common] law,[3] the sole right of action of the joint creditors is against the survivors.[4] And the inquiry here naturally presented is, whether they have any remedy in equity. The doctrine formerly held upon this subject seems to have been, that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt.[5] But

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[1] Ibid.; 1 Chitty on Plead. p. 39, 40, 3d edit.; Bacon, Abridg. Obligation, D. 4; Comyns, Dig. Abatement, F. 8; Godson *v.* Good, 6 Taunt. R. 487; Bovill *v.* Wood, 2 Maule & Selw. 23; Richards *v.* Hunter, 1 Barn. & Ald. 29; Collyer on Partn. B. 3, ch. 5, § 2, p. 503, 2d edit.

[2] See authorities cited in note (1) of this section.

[3] In Massachusetts a statute has changed this principle. Mass. Rev. Stat. ch. 66, § 27.

[4] Ante, § 361, note (2).

[5] See Lane *v.* Williams, 2 Verm. R. 292; Jacob *v.* Harwood, 2 Ves. 265;

that doctrine has been since overturned; and it is now held, that in equity all partnership debts are to be deemed joint and several;[1] and consequently the joint creditors have in all cases a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent, or bankrupt, or not.[2] The consequence is, that the joint creditors

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Hankey v. Garrett, 1 Ves. Jr. 236; Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, 11 Ves. 3; Ex parte Kendall, 17 Ves. 519; Campbell v. Mullett, 2 Swanst. R. 576; Gray v. Chiswell, 9 Ves. 118; Collyer on Partn. B. 3, ch. 3, § 4, p. 404 to p. 408, 2d edit.; Hamersley v. Lambert, 2 Johns. Ch. R. 508; Gow on Partn. ch. 5, § 2, p. 359, 360, 3d edit. [This doctrine is still maintained in New York. See Lawrence v. Trustees of Orphan House, 2 Denio, R. 577.]

[1] By the civil law of France, the rule as to the obligations of partners on their partnership contracts, does not seem to agree exactly with the rule of the common law. They are always understood to contract jointly, but not always severally. The general rule is, that each partner is considered as contracting only to the extent of his interest; and in any case, unless there be an express agreement by all the partners to bind themselves severally, the creditor can only recover from each his own proportion of the debt. One exception to this rule is indeed admitted in favor of commercial partnerships (sociétés de commerce), wherein the partners are liable jointly and severally (solidairement) for the debts of the partnership; and this exception is created for the purpose of extending the credit of merchants. But in universal partnerships (sociétés universelles), and in all special partnerships (sociétés particulieres), which are not commercial partnerships, each partner, although he is presumed to contract in the name of the firm, only binds each one of his copartners for his proportional part of the debt. When, indeed, a partner has contracted for the firm in his own sole name, he is solely responsible to the creditor, but he has a legal claim for indemnification and contribution therefor on each partner for his proportion, unless he have transgressed the limits of his authority, or been guilty of fraud. See Pothier, de Societé, ch. vi. § 1, No. 96, § 111, No. 103 to No. 106.

[2] Collyer on Partn. B. 3, ch. 3, § 4, p. 407 to p. 413, 2d edit.; Devaynes v. Noble, 1 Meriv. R. 589; 2 Russ. & Mylne, 495; Sumner v. Powell, 2 Meriv. R. 37; Wilkinson v. Henderson, 1 Mylne & Keen, 582; Thorpe v. Jackson, 2 Younge & Coll. 553; Gow on Partn. ch. 5, § 2, p. 358, 359, 360,

need not now wait, until the partnership affairs are wound up, and a final adjustment thereof is made. But they may at once proceed, as upon a joint and several contract, in equity against the estate of the deceased partner; although in any such suit the surviving partners must be made parties, as persons interested in taking the account.[1]

3d edit.; Id. § 3, p. 290, 291, 292; 1 Story on Eq. Jurisp. § 676; 3 Kent, Comm. Lect. 43, p. 64, 4th edit.; Hamersley v. Lambert, 2 Johns. Ch. R. 508; Belknap v. Abbott, 11 Ohio (Stanton) R. 411. In Devaynes v. Noble, 1 Meriv. 529, 563, 564, Sir William Grant (Master of the Rolls), said: "It may be proper, however, to observe, that the common law, though it professes to adopt the Lex Mercatoria, has not adopted it throughout in what relates to partnership in trade. It holds, indeed, that although partners are in the nature of joint-tenants, there shall be no survivorship between them in point of interest. Yet, with regard to partnership contracts, it applies its own peculiar rule; and, because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors; whereas, I apprehend, by the general mercantile law, a partnership contract is several, as well as joint. That may probably be the reason, why Courts of Equity have considered joint contracts of this sort (that is, joint in form), as standing on a different footing from others. The cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect, than it was the intention of the parties themselves to have given to them. But, how is it possible to explain the cases upon partnership notes, so as to distinguish them from ordinary partnership debts?"

[1] Collyer on Partn. B. 3, ch. 3, § 4, p. 404, 405, 2d edit.; Ante, § 347; Wilkinson v. Henderson, 1 Mylne & Keen, 582, 588. On this occasion Sir John Leach (Master of the Rolls) said: "All the authorities establish, that, in the consideration of a Court of Equity, a partnership debt is several, as well as joint. The doubts upon the present question seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and that the joint estate, vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner, before he seeks satisfaction from the assets of the deceased partner. It is admitted, that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is, whether the joint creditor shall be compelled to pursue the surviving

§ 363. Still another inquiry may remain, in cases where the estate of the deceased partner is not sufficient to pay all his separate debts, and all the joint debts; and that is, whether the debts are to be paid *pari passu* out of the assets of the deceased, or either is entitled to a preference. The general rule would seem to be (as it is in bankruptcy), that the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors a like right of priority to payment out of the separate estate; and the surplus, if any, is divisible among the other class of creditors.[1] In cases where there is both a joint estate

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partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is at all events liable to the full satisfaction of the creditors, and must first or last be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and, further, that according to the two decisions in Sleech's Case in the cause of Devaynes *v.* Noble, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable, as between the partners, without first having resort to dividends, which might be obtained by proof under the commission against the surviving partner. I am of opinion, that the plaintiff is entitled in this case to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of Shepherd, the deceased partner." [But see Lawrence *v.* Trustees of Orphan House, 2 Denio, R. 577; Patterson *v.* Brewster, 4 Edw. Ch. R. 352, where the case of Wilkinson *v.* Henderson is examined and disapproved.]

[1] Gray *v.* Chiswell, 9 Ves. 118, 124, 125; Twiss *v.* Massey, 1 Atk. 67; Ex parte Cook, 2 P. Will. 500; Ex parte Clay, 6 Ves. 633; Collyer on Partn. B. 4, ch. 2, § 1, p. 595, 2d edit.; Id. § 3, p. 623, 624; 3 Kent,

and a separate estate, the rule may not be unreasonable, as, at most, it only puts the joint creditors of the partnership to an election, whether they will proceed against the joint estate, or against the separate estate, where both estates are insolvent. But, where there is no joint estate, the case may seem to be involved in more nicety and difficulty; since under such circumstances the creditors would seem, as their contract is several, as well as joint, to be entitled, upon general principles, to claim *pari passu* with the separate creditors.[1] However, it cannot be positively affirmed, that such is the settled doctrine in equity, in cases of deceased partners. On the contrary, there seems to be some conflict of opinion upon the point.[2] In bank-

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Comm. Lect. 43, p. 64, 65, 4th edit.; Murray *v.* Murray, 5 Johns. Ch. R. 74 to 77; Tucker *v.* Oxley, 5 Cranch, R. 34, 44, 45; Gow on Partn. ch. 5, § 3, p. 286, 287, 3d edit.; Id. p. 316 to p. 323; Payne *v.* Matthews, 6 Paige, R. 19; Comm. Bank of Lake Erie *v.* Western-Reserve Bank, 11 Ohio (Stanton) Rep. 444, 451; Bridge *v.* McCullough, 27 Ala. 661; Rodgers *v.* Meranda, 7 Ohio St. R. 187, where the subject is very ably examined. Walker Eyth, 25 Penn. St. R. 216. — This doctrine has not been universally adopted in America. Mr. Chancellor Kent has collected the principal cases in his Note (b) to 3 Kent, Comm. Lect. 43, p. 65, 4th edit. The subject was also very fully discussed by the same learned Judge, and all the then existing authorities were cited by him in Murray *v.* Murray (5 Johns. Ch. R. 60), and by Mr. Chief Justice Tilghman, and Mr. Justice Gibson, and Mr. Justice Duncan, in Bell *v.* Newman, 5 Serg. & R. 78, 85 to 107. Still more recently this doctrine has been reviewed at large by Mr. Chief Justice Shaw, in an elaborate opinion, in Allen *v.* Wells, 22 Pick. R. 450; and the conclusion to which he has arrived seems entirely well founded, that the doctrine is one that can be properly enforced in equity only, and not at law. The comments of all these learned Judges upon the general doctrine are very instructive, and in a great measure exhaust the subject.

[1] Collyer on Partn. B. 3, ch. 3, § 4, p. 413, 2d edit.; Emanuel *v.* Bird, 19 Ala. 596.

[2] Cowell *v.* Sikes, 2 Russ. R. 191, 194, 196. — In this case Lord Gifford (Master of the Rolls) seemed to be of opinion, that the joint creditors under such circumstances could not come in, *pari passu*, with the separate creditors. But Lord Eldon, under the circumstances of that particular

ruptcy, where there is no joint estate, and there is no solvent partner, joint creditors are permitted to prove

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case, thought otherwise. Mr. Collyer on this subject says: "We ought not to conclude this subject without adverting to the question, whether, when a partnership creditor has obtained a decree in equity for payment of his debt out of the estate of the deceased partner, he is entitled to receive payment *pari passu* with the separate creditors of that partner. If this point were decided on principle alone, and without reference to any supposed analogy between the practice in the Courts of Equity and the practice in bankruptcy, it seems clear, that the partnership creditor, as resting on his separate contract, would have a right to come in competition with the separate creditors. On the other hand, the cases of Gray *v.* Chiswell, and Cowell *v.* Sikes, tend to show, that, by analogy to the rule in bankruptcy, the partnership creditor will in such case be postponed to the separate creditors, unless there be no joint estate. Mr. Chancellor Kent, in his Commentaries, seems to have laid down the doctrine in general terms, as equally applicable to all cases. His language is: "The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund, after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied. The basis of the general rule is, that the funds are to be liable, on which the credit was given. In contracts with a partnership the credit is supposed to be given to the firm; but those who deal with an individual member rely on his sufficiency." 3 Kent, Comm. Lect. 43, p. 64, 65, 4th edit. The modern Code of Commerce of France provides (art. 534), that the creditor, holding a joint and several obligation of the insolvent and other persons, who are also insolvent, shall participate in the dividends of all their respective estates,

against the bankrupt's estate *pari passu* with the separate creditors.[1]

§ 364. Be this doctrine as it may, it seems certain, that the joint creditors cannot be compelled, in case of the death of one partner, and the bankruptcy of the survivors, to resort to the estate of the deceased partner for payment for the benefit of the fund in bankruptcy, in aid of creditors, who are creditors of the survivors, and not of the old partnership.[2] For the rule in equity, that, where one person can resort to two funds for payment, and another can resort to one only, the latter may compel the former to resort to the fund to which he may exclusively resort, in aid of the latter, applies only where both debts are due by precisely the same debtors.[3]

§ 365. This principle of Equity Jurisprudence, that the joint creditors shall be entitled to a priority of payment out of the joint effects, and the separate creditors to a like priority out of the separate effects, before the other class of creditors shall be entitled to any portion of the surplus, is not, perhaps, under all its aspects, so purely artificial as it has sometimes been suggested to be; at least, it has been often relied

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until he shall be fully paid. See also Duranton, Cours de Droit Franç. Tom. 17, § 457, and Duvergier, Droit Civil Franç. Tom. 5, § 406, cited post, § 365; Pardessus, Droit Comm. Tom. 4, § 1089.

[1] Ex parte Kensington, 14 Ves. 447; Ex parte Janson, 3 Madd. R. 229; Buck's Cas. 227; Ex parte Sadler, 15 Ves. 52; Collyer on Partn. B. 4, ch. 2, § 3, p. 624, 626, 627, 2d edit. [In Massachusetts under the insolvent law, St. 1838, c. 163, the fact that there is no joint property will not give joint creditors a right to prove against the separate estate of the partners. Somerset Potter Works v. Minot, 10 Cush. 592; Howe v. Lawrence, 9 Cush. 553.]

[2] Ex parte Kendall, 17 Ves. 514, 526, 527; Collyer on Partn. B. 4, ch. 2, § 3, p. 629, 630, 2d edit.

[3] Ibid.; 1 Story on Eq. Jur. § 558 to 560; Id. § 642 to 645.

upon, as the dictate of natural justice.[1] In the Roman law, if one man carried on two separate trades, it seems, that the creditors, who separately supplied goods or credit for the use of either of those trades, had a privilege or right of payment out of the property employed therein, in preference to the creditors in the other business. *Utputa* (says Ulpian), *duas negotiationes exercebat (puta sagariam et lintiariam) et separatos habuit creditores? Puto, separatim eos in tributum vocari; unusquisque enim eorum merci magis, quam ipsi, credidit.*[2] Straccha lays down the like doctrine in the case of the failure or insolvency of a merchant, engaged in two kinds of business. *Si mercator duas negotiationes exercuisset, puta sagarium et lintearium, et separatos habuerit creditores in dictis mercibus, separatos eos in tributum vocari; et illa ratio in prædictis redditur; quia unusquisque creditor magis merci, quam mercatori, credidit; et ne ex alterius re merceve alii indemnes fiant, alii damnum sentiant.*[3]

§ 366. Emerigon holds the same doctrine; and says, that where a person carries on two trades in different houses, the creditors who have given credit to one of these trades or houses, have a privilege upon the effects there found, to the exclusion of the creditors who have given credit to the other trade or house; and these last creditors have also a like exclusive privilege upon the effects of the trade or house to which they have given

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[1] Ex parte Elton, 3 Ves. 242; Rodgers v. Meranda, 7 Ohio St. R. 189.

[2] Dig. Lib. 14, tit. 4, l. 5, § 15; Pothier, Pand. Lib. 14, tit. 4, n. 8; 2 Emerig. Contrats a la Grosse, ch. 12, § 6, p. 582, edit. 1783; Inst. Lib. 4, tit. 7, § 3; Duranton, Cours de Droit Franç. Tom. 17, § 457, p. 512, 513, 514.

[3] Straccha de Decoctoribus, Pars Ultima, n. 21, p. 469, edit. 1669.

credit.[1] And he puts the very case of the joint creditors of a partnership, as clearly settled in the French law, saying, that the joint creditors of a partnership have a privilege or preference of payment out of the partnership effects, before the separate creditors of any one partner; and that the respective creditors of two different partnerships have the like exclusive privilege and preference upon the partnership effects of each partnership, although both firms are composed of the very same persons.[2] And he gives the very reason assigned therefor in the Roman law: *Unusquisque enim eorum merci magis, quam ipsi, credidit.*[3] This also seems to be the recognized doctrine in the modern jurisprudence of France; and it has been so promulgated by some of its most approved jurists.[4]

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[1] Emerigon, Contrat a la Grosse, ch. 12, § 6, p. 582, edit. 1783.

[2] Ibid.

[3] Ibid. See also 2 Story on Eq. Jur. § 1221 to 1223, 1239, 1240.

[4] Duranton, Cours de Droit Franç. Tom. 17, § 457, p. 512 to p. 515; Duvergier, Droit Civil Franç. Tom. 5, § 405, 406; Pardessus, Droit Comm. Tom. 4, § 1089, 1207. — In relation to the correlative principle, that the separate creditors ought first to be paid out of the separate effects of the debtor partner, there does not seem to be the same uniformity of opinion at present prevailing in France, although Duranton strongly inclines to hold it. His language is: "Mais il n'y a pas lieu de dire, en sens inverse, que les créanciers particuliers d'un associé doivent être payés sur les biens personnels de cet associé, par préférence aux créanciers, qu'il à raison de la société, même en ci qui concerne la part de ses coassociés dans ces mêmes dettes, dans le cas ou ils en seraient tenus solidairement, soit parce que la société serait en nom collectif, soit parce que les associés se seraient obliges avec clause de solidarité; car cet associé est obligé, à l'égard des uns, comme à l'égard des autres, sur tous ses biens présens et à venir, par conséquent sur ses biens particuliers comme sur ceux, qu'il avait pour sa part dans la société. Et de même que les créanciers particuliers d'un héritier ne peuvent demander la séparation de son patrimoine d'avec celui du défunt (art. 881), pour être payés sur ses biens par préférence aux créanciers de la succession, de même les créanciers particuliers d'un associé no doivent pas pouvoir demander la séparation de ses biens personnels de ceux, qu'il a dans la societé, pour

§ 367. In relation to what properly constitute joint debts of the partnership, and what constitute separate debts of the particular partners, the considerations already suggested in another place will, in a great measure, supersede any discussions here.[1] It may, however, be generally stated, that wherever the original credit is given to the partnership, that will constitute a debt against the partnership, notwithstanding the partner contracting the debt may also have given his own separate security therefor, or have also made himself personally liable therefor.[2] And, on the other hand, wher-

être payés sur ces mêmes biens par préférence aux créanciers, qu'il a relativement aux affaires de cette société. Il y a parité parfaite ; cet associé, en contractant la société, et des dettes relativement à cette même société, a fait ce qu'il avait le droit de faire, comme un héritier, qui, en acceptant purement et simplement une succession obérée, a pris sur lui les dettes du défunt. Tout ce qu'on pourrait dire de plus juste, et telle est l'opinion de plusieurs personnes, c'est que si les créanciers de la société demandent à être payés par préférence sur ses biens ils doivent souffrir que les créanciers particuliers de l'associé soient payés par préférence à eux sur les biens personnels de cet associé. La loi citée au n° précédent fournirait un argument pour le décider ainsi. On en trouverait un semblable dans la loi 3, § 2, ff. de Separationibus, ou Papinien, contre le sentiment de Paul et d'Ulpien (dans la 5e, au même titre), qui ne voulaient pas, que les effets de la séparation pussent être scindés, admettait bien les créanciers du défunt, qui avaient demandé la séparation des patrimoines, à se faire payer aussi sur les biens particuliers de l'héritier, mais toutefois aprés discussion préalablement faite de ceux du défunt, et, en outre, après le paiement intégral des créanciers particuliers de l'héritier ; decision qu'avait adoptée Domat, Lebrun, et Pothier. Comme le point en question n'est pas positivement prévu et réglé par le Code Civil, les Juges, en virtu de l'article 4, pourraient le décider de la sorte, en suivant les régles de l'équité, qui parissent en effet vouloir une semblable décision." Duranton, Cours de Droit Français, Tom. 17, § 458, p. 515 to 517. Mr. Duvergier holds a different opinion. Duvergier, Droit Civil Franç. Tom. 5, § 406.

[1] Ante, § 126 to 155 ; Collyer on Partn. B. 4, ch. 2, § 1, p. 613 to 622, 2d edit.

[2] Ante, § 140 ; Gow on Partn. ch. 5, § 3, p. 282, 283, 284, 285 ; Watson on Partn. ch. 5, p. 274 to 278, 2d edit. ; Ex parte Brown, cited 1 Atk. 225 ; Ex parte Emly, 1 Rose, R. 65 ; Ex parte Hunter, 1 Atk. 223.

ever the original credit has been exclusively given to the partner contracting the debt, the partnership will not be liable therefor, but the individual partner only, although it has been applied to the use and benefit of the partnership.[1]

§ 368. So, also, if the original debt is exclusively contracted by one partner on his own account, but it has been immediately assumed by the partnership, with the consent and approbation of the creditor, as a partnership debt, it will henceforth be treated in his favor as a joint debt.[2] So, if one partner is separately intrusted with trust-money, and he, with the knowledge and consent of his partners, applies it to partnership purposes, it will constitute a joint debt against the partnership, at the election of the *cestui que trust*, or beneficiary.[3]

§ 369. Cases also may arise in a more general form, involving the like considerations, whether debts, originally separate, have been converted into joint debts; or debts, originally joint debts, have been converted into separate debts, at any other period subsequent to their first creation; and also, whether, if there has been such a conversion, the original debts have been thereby

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[1] Ibid.

[2] Ante, § 142, 154; Gow on Partn. ch. 5, § 3, p. 284, 285, 286, 3d edit.; Ex parte Jackson, 1 Ves. Jr. 131; Ex parte Peele, 6 Ves. 604; Ex parte Williams, Buck, R. 13; Ex parte Apsley, 3 Bro. Ch. R. 265; Collyer on Partn. B. 4, ch. 2, § 1, p. 613 to 622, 2d edit.; Ex parte Freeman, Buck, R. 471; Watson on Partn. ch. 6, p. 274, 275, 2d edit.

[3] Gow on Partn. ch. 5, § 3, p. 285, 3d edit.; Ex parte Watson, 2 Ves. & Beam. 414; Smith v. Jamieson, 5 Term R. 601; Keble v. Thompson, 3 Bro. Ch. R. 112; Collyer on Partn. B. 4, ch. 2, § 1, p. 616 to 622, 2d edit.; Id. ch. 2, § 5, 638, 639; Ex parte Clowes, 2 Bro. Ch. R. 595; Watson on Partn. ch. 5, p. 274 to 278, 2d edit.

intentionally extinguished, or not.[1] It is obvious, that the remedy of the creditors against the estates of the partners, either joint or several, may be materially affected by each of these facts, and especially by the latter. By the conversion of debts, in the technical sense of the phrase, is meant the changing of their original character and obligation with the consent of the creditors; so that, if they are originally joint debts of all the partners, they become, by consent, the separate debts of one partner; or, if they are the separate debts of one partner, they become, by the like consent, the joint debts of all the partners. It is obvious, that this conversion may be with an intention, either to extinguish the original debt, or merely to give the creditor an additional security therefor; and the law will give effect to it according to that intention. Where the original debts have been converted with an intention to extinguish them (which can only be where a sufficient consideration exists or passes between the parties), there, the creditors must rely solely on their debts in their new quality or form, and are entitled to receive compensation out of the joint estate or several estate, according to the nature of the conversion, and in conformity to the principle already stated.[2] But, where the original debts have been converted without any such extinguishment (which, also, can only be upon a sufficient consideration), the creditors can take advantage of the debts, according either to their new or their

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[1] Collyer on Partn. B. 4, ch. 2, § 2, p. 613, 614, 2d edit.; Ante, § 155 to 157; Watson on Partn. ch. 5, p. 274, 275, 2d edit.

[2] Collyer on Partn. B. 2, ch. 1, § 2, p. 113, 2d edit.; Id. B. 4, ch. 2, § 2, p. 614; 1 Montagu on Partn. B. 2, ch. 7, § 2 [p. 226 to 232 (Amer. ed.)]; Watson on Partn. ch. 5, p. 256, 257, 2d edit.; Bolton v. Puller, 1 Bos. & Pull. 539.

old form and quality.[1] In other words, they may treat them as joint, as well as separate debts, and have their remedy against the joint or separate estate accordingly in their election. The creditors are, therefore, ordinarily, in this latter case, in a far more beneficial condition than in the former;[2] and this may be, especially in cases of bankruptcy, a right of no inconsiderable value.[3]

§ 370. The question, therefore, may become highly important to ascertain, what, upon any such conversion, will amount to a conversion of the original debt with any extinguishment; and what will amount to a conversion thereof without such extinguishment. And here, again, what has been already stated may serve, in a great measure, to explain and solve most questions of this sort.[4] In order to produce any conversion at all, either with or without an extinguishment, there must be a sufficient consideration, and also a deliberate and mutual assent of the creditors and debtors to such conversion. Both must concur; and the offer and the acceptance must be upon the same

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[1] Collyer on Partn. B. 4, ch. 2, § 2, p. 614, 2d edit.; Id. B. 2, ch. 1, § 2, p. 113.

[2] Ibid.

[3] Collyer on Partn. B. 4, ch. 2, § 5, p. 634 to 641, 2d edit.; Gow on Partn. ch. 5, § 3, p. 286 to 288, 3d edit.

[4] Ante, § 157 to 159; Collyer on Partn. B. 3, ch. 3, § 3, p. 384 to p. 389, 2d edit. — See especially the cases already cited (Ante, § 156 to 159), where, upon the retirement of one partner, there have been subsequent dealings by the joint creditors with the remaining partners, constituting a new firm, and new securities have been taken, and new credits obtained, and new accounts opened, and new stipulations entered into between them, with reference to the old debts, when and under what circumstances they will amount to a conversion of the old debts, and an extinguishment. Mr. Collyer and Mr. Gow have cited the cases at large in the passages above referred to.

conditions, stipulations, and limitations.[1] In short, all the terms must be accepted and complied with.[2] And it may be laid down, as a general rule, that where a separate creditor has taken a partnership bill, or note, or other security, in full discharge of his original claim, there, the separate debt is converted into a joint debt, and the original remedy is extinguished.[3] The same rule will apply in the converse case, where a joint creditor has taken the separate bill, or note, or other security, in discharge of the joint debt. But, if the evidence goes only to show, that the bill, or note, or other security was given, not in discharge of, but as a collateral security for the original debt, in such a case the original debt and remedy will still remain.[4]

§ 371. Another question may arise, and that is, as to what is to be deemed joint property of the partnership, and what separate property of the respective

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[1] Collyer on Partn. B. 4, ch. 2, § 2, p. 617 to 620, 2d edit.; Id. ch. 2, § 1, p. 608, 609.

[2] Ibid.; Ex parte Fairlie, 1 Montagu on Partn. 17; Ex parte Peele, 6 Ves. 602; Ex parte Williams, Buck, R. 13; Ex parte Freeman, Buck, R. 471; Ex parte Fry, 1 Glyn. & Jam. 96; Gow on Partn. ch. 5, § 3, p. 284, 285, 3d edit.

[3] Collyer on Partn. B. 4, ch. 2, § 2, p. 614 to 618, 2d edit.; Ex parte Seddon, 2 Cox, R. 49; Gow on Partn. ch. 5, § 3, p. 282 to 286, 3d edit.; Ex parte Lobb, 7 Ves. 592; Ex parte Roxby, 1 Mont. on Partn. 203; Ex parte Fairlie, 1 Mont. on Partn. 17; Ex parte Clowes, 2 Bro. Ch. R. 595; David v. Ellice, 5 Barn. & Cresw. 196; Gow on Partn. ch. 5, § 4, p. 359 to 367, 3d edit.; Id. ch. 5, § 4, p. 360 to 366.

[4] Collyer on Partn. B. 4, ch. 2, § 2, p. 615, 616, 2d edit.; Id. B. 3, ch. 3, § 3, p. 384 to 388; Ex parte Seddon, 2 Cox, R. 49; Ex parte Lobb, 7 Ves. 592; Ex parte Roxby, 1 Montagu on Partn. 203; Ex parte Hodgkinson, Cooper, R. 101; Ex parte Hay, 15 Ves. 4; Ex parte Slater, 6 Ves. 146; Evans v. Drummond, 1 Barn. & Cresw. 113; Reed v. White, 5 Esp. R. 122; Thompson v. Percival, 5 B. & Adol. 925; Ex parte Whitmore, 3 Mont. & A. 627; Oakley v. Pasheller, 10 Bligh, 548; s. c. 4 Clark & Fin. 297; Watson on Partn. ch. 5, p. 274 to 277, 2d edit.

partners. This, not unfrequently, becomes a perplexing and complicated inquiry in cases of bankruptcy; and it is sometimes not wholly free from doubt in other cases. But, as with few exceptions, and these chiefly arising upon reputed ownership under the statutes of bankruptcy,[1] the same general principles apply to all classes of cases, we shall consider them (reserving the exceptions for a future discussion) in this place.

§ 372. The joint estate of the partnership is that which belongs to the firm, and in which the partnership have a joint interest, either at law or in equity, at the time of the dissolution.[2] The separate estate is that in which any of the partners has a separate interest, either at law or in equity, at the same period; and it is not the less his separate estate, although it may be actually possessed and used by the partnership at the time, for partnership purposes, if in truth it is merely for the accommodation thereof, and the partnership have no interest whatsoever therein.[3] The partners may, by their articles of partnership, agree as to what shall be deemed partnership property, and what shall be deemed separate property, at the time of the dissolution. So they may, during the partnership, convert joint property into separate property, or separate property into

[1] See Ex parte Enderby, 2 Barn. & Cresw. 389; in re Todd, 1 De Gex, R. 134; Collyer on Partn. B. 4, ch. 2, § 1, p. 597 to 600, 2d edit.; Gow on Partn. ch. 5, § 3, p. 267, 268, 271, to 274, 3d edit.; Id. § 2, p. 232 to 234; Watson on Partn. ch. 5, p. 256 to 260, 2d edit.; Id. p. 264 to 272.

[2] Ante, § 88 to 100.

[3] Collyer on Partn. B. 4, ch. 2, § 1, p. 595, 596, 2d edit.; Ex parte Hamper, 17 Ves. 404, 412, 413; Gow on Partn. ch. 5, § 3, p. 271 to 274.

joint property; and the property will, at the dissolution, be held to possess that character, and that only, which is imposed upon it at the time.[1] Hence, if upon a dissolution, any partnership property be left in the possession of one partner, but not for the purpose of carrying on the trade therewith, on his own account, it will be deemed partnership property, and retain its true character, notwithstanding such partner shall subsequently, while it is in his possession, become a bankrupt.[2] The reason is, that the property is in his hands, merely as a trustee of the partnership; and trust property is not deemed to be the reputed property of the bankrupt.[3]

§ 373. In relation to the assignment of separate debts by a partner to the firm, or the assignment of joint debts by the firm to a separate partner (subject to the exceptions arising under the bankrupt laws),[4] the debts will be treated as joint or several in equity, according to the intention of the parties, whether they are actually reduced into possession, or whether actual notice has been given to the debtors or not. For such an assignment will operate in equity as a complete transfer of the debts, if made *bonâ fide*, and for a valid consideration. In respect to the assignment of other property, the transfer need be made only in the same way and manner, as it ought to be, to be valid if made in favor of a third person. But, in all these cases, the transfer

[1] Collyer on Partn. B. 4, ch. 2, § 1, p. 596, 597, 2d edit.; Id. p. 600, 601, 603 to 606; Ex parte Ruffin, 6 Ves. 119.

[2] Collyer on Partn. B. 4, ch. 2, § 1, p. 596, 597, 2d edit.; Watson on Partn. ch. 5, p. 314 to 320, 2d edit. See also Stocken *v.* Dawson, 9 Beav. R. 239.

[3] Winch *v.* Keely, 1 T. R. 619; Copeman *v.* Gallant, 1 P. Will. 314; Ex parte Flyn, 1 Atk. 185; Ex parte Williams, 11 Ves. 3, 5, 6; Collyer on Partn. B. 4, ch. 2, § 1, p. 597 to 599, 2d edit.

[4] Gow on Partn. ch. 5, § 3, p. 275, 276, 3d edit.

by assignment must be complete, and all the conditions thereof fulfilled, otherwise it will not amount to a conversion of the property.[1]

§ 374. We come, in the next place, to the consideration of the effects and consequences of a dissolution by bankruptcy upon the rights of creditors. It might at first view be supposed, that the doctrines upon this subject, being the growth of the bankrupt system of England, were not of much importance to be examined or studied elsewhere. But, when it is considered, that the jurisdiction exercised by the Courts in cases of bankruptcy, is founded upon the general notion of administering the principles of equity and general justice between the parties (although these principles may, perhaps, in some instances be administered upon artificial reasoning), it will be found, that they furnish many lights by which the corresponding systems of other nations in the analogous cases of insolvency, and the *Cessio bonorum*, may frequently be illustrated and expounded. It is mainly upon considerations of this sort, that they are here brought under review.

§ 375. It is obvious, that many of the considerations already suggested, as applicable to other cases of dissolution, are also applicable to cases of bankruptcy.[2] Thus, for example, the assignees, in the case of the separate bankruptcy of one partner, can affect the joint property no further than the bankrupt himself. They

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[1] 2 Story on Eq. Jur. § 1039 to 1048; Collyer on Partn. B. 4, ch. 2, § 1, p. 612, 613, 2d edit.; Ex parte Ruffin, 6 Ves. 119; Gow on Partn. ch. 5, § 3, p. 268 to 270, 3d edit. See and consult the cases cited by Mr. Collyer on Partn. B. 4, ch. 2, § 1, p. 605 to 610, 2d edit.; Gow on Partn. ch. 5, § 3, p. 268 to 281, 3d edit.; which, though arising in bankruptcy, show what the general principle is, where there is no bankruptcy.

[2] See Gow on Partn. ch. 5, § 3, p. 299, 300, 3d edit.

have no right to change the possession or to make any specific division of the joint effects. They take only such an undivided share or interest therein, as the bankrupt himself had, and in the same manner as he held it; that is to say, subject to all the rights and liens of the other partners; and they are entitled only to the balance, which is ascertained to be due to the bankrupt, after all the partnership debts and the claims of the solvent partners are paid, and a division is made of the surplus.[1] But there are some doctrines, which are peculiar to the latter cases, and therefore require a distinct and separate examination. It is not the design of these Commentaries to enter into a general discussion of all the various topics belonging to the administration in bankruptcy of the joint and separate effects; or to the administration in bankruptcy in cases under a joint commission against all, or a separate commission against one or more of the partners; or of the practice and proceedings in matters of bankruptcy. A full and exact exposition of these subjects properly belongs to a regular Treatise on the principles, the proceedings, and the practice in bankruptcy, rather than to an elementary work on the subject of partnership, which can discuss but a single branch thereof.[2] Our remarks will,

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[1] Gow on Partn. ch. 5, § 3, p. 300, 3d edit.; Watson on Partn. ch. 5, p. 312, 313, 2d edit.

[2] The learned reader will find very ample information upon the practice and proceedings and administration of assets in bankruptcy, in Gow on Partn. ch. 5, § 3, p. 256 to p. 348, 3d edit.; in Collyer on Partn. B. 4, ch. 2, § 1 to 21, p. 595 to p. 678, 3d edit.; Id. ch. 3, p. 686 to p. 716; in Watson on Partn. ch. 5, p. 243 to p. 356, 2d edit.; in 1 Montagu on Partn. B. 2, ch. 7 [p. 226 to p. 233, Amer. edit.]; and still more amply in Cook on Bankruptcy, Christian on Bankruptcy, Deacon on Bankruptcy, and Montagu & Ayrton on Bankruptcy. The doctrines stated in the text have in some few cases been qualified or modified by the recent Bankrupt Act in England.

therefore, be limited to a few prominent considerations of a general nature, which may principally serve to illustrate the doctrines in bankruptcy, as contradistinguished from those which are commonly applicable to other cases of dissolution, or which may qualify or vary the latter.

§ 376. In the first place, then, it is a general rule in bankruptcy, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over the separate debts of the bankrupt; and so, in the converse case, the separate debts are primarily payable out of the separate effects of the bankrupt, and possess a like preference; and the surplus only, after satisfying such priorities, can be reached by the other class of debts.[1] For this purpose, the joint estate and the separate estate of the bankrupt constitute separate funds, to be administered separately by the assignees under the commission, whether it be a separate commission

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But it seemed unnecessary in the present work minutely to examine them, as they involve no general principles of Equity Jurisprudence as administered in bankruptcy.

[1] Gow on Partn. ch. 5, § 3, p. 235, 236, 3d edit.; Id. p. 281, 282, 299, 300; Collyer on Partn. B. 4, ch. 2, § 3, p. 623, 2d edit.; Id. B. 2, ch. 1, § 2, p. 119; Twiss *v.* Massey, 1 Atk. 67; Ex parte Cook, 2 P. Will. 500; Ex parte Elton, 3 Ves. 240; Ex parte Abell, 4 Ves. 837; Ex parte Clay, 6 Ves. 833; In re Plummer, 1 Phill. Ch. R. 56, 60; Bolton *v.* Puller, 1 Bos. & Pull. 539, 545; Murrill *v.* Neill, *8 Howard, R. 414; Jackson *v.* Cornell, 1 Sandf. Ch. R. 348; Woddrop *v.* Ward, 3 Des. Eq. R. 203; Jarvis *v.* Brooks, 3 Foster, 136; Bridge *v.* McCullough, 27 Ala. 661; Rodgers *v.* Meranda, 7 Ohio St. R. 189; Washburn *v.* Bank of Bellows Falls, 19 Verm. R. 278; Watson on Partn. ch. 5, p. 262, 263, 2d edit.; Id. p. 324 to 334. — In Ex parte Field, in Bankruptcy, Montagu, Deacon & De Gex, R. 95, the Chief Judge (in Bankruptcy) said: "It appears to me that long known decisions have settled the point, that a joint debt cannot be proved against the separate estate of a bankrupt, so long as there are joint assets or a solvent partner." The rule equally applies to cases of co-contractors as of partners. Ibid.; Ex parte Morris, Mont. B. R. 218.

against one partner, or a joint commission against all the partners.[1]

§ 377. This rule, although now firmly established, has occasioned much diversity of opinion among learned Judges at different times.[2] It was established at an early period; but was afterwards departed from, and was again reëstablished; and it now stands, as

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[1] Gow on Partn. ch. 5, § 3, p. 280 to 282, 3d edit.; Id. p. 299, 300, 311, 312; Watson on Partn. ch. 5, p. 243 to 245, 2d edit.; Id. p. 252 to 260; Id. p. 262, 263; Purple *v.* Cooke, 4 Gray, 120; Bolton *v.* Puller, 1 Bos. & Pull. 539; Collyer on Partn. B. 3, ch. 2, § 3, p. 624, 2d edit. — Lord Chief Justice Eyre, in delivering the opinion of the Court, in Bolton *v.* Puller (1 Bos. & Pull. 539, 547, 548), said: "Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice Heath suggested this consideration at the close of the first argument. It is a very important consideration. If all become bankrupts, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property, and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience, which has been adopted, restrains the separate creditor from resorting, in the first instance, to his debtor's share of the joint property; and also restrains the joint creditor from resorting, in the first instance, to the separate property of his debtor. Bankruptcy has been called a statute execution; but if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the Chancellor, who is to take order for the distribution of the effects of a bankrupt. Under the rule the separate creditors have a right to be satisfied for their debts out of the separate property in preference to the joint creditors. But what shall be deemed separate property, or what effect the claims of third persons upon that, which (as between one partner and the partnership) would be separate property, are questions which neither bankruptcy nor the rule of distribution seem to touch. The assignees stand but in the place of the bankrupt, and take the effects subject to every legal and equitable claim upon those effects."

[2] See Cleghorn *v.* The Insurance Bank, 9 Georgia, 322.

much, if not more, upon the general ground of authority and the maxim, *Stare decisis*, than upon the ground of an equitable reasoning. In truth, it is precisely such a case, as may well justify a great deal of argument on each side; and, although it has been said, that the equity of this mode of distribution is very plain, because each estate ought to bear its own debts; yet it is by no means clear, that this is not an artificial suggestion, cutting down the difficulty, and assuming the correctness of the rule, rather than showing, that it has its origin and foundation in the principles of natural justice, *ex æquo et bono*.[1]

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[1] Ante, § 363, 364. — Mr. Gow (p. 312 to 314) has summed up the doctrine of the authorities on this subject as follows. "In the time of Lord Hardwicke, the rule adopted was to permit joint creditors to prove under a separate commission against one partner, or under separate commissions against all the partners, for the purpose of assenting to, or dissenting from, the certificate; and the joint creditors were considered to have an equitable right to any surplus of the separate estates, after payment of the separate creditors; but the joint property was distributed under a joint commission taken out for that purpose, or a bill must have been filed for an account of the joint estate. Ex parte Baudier, 1 Atk. 98; Ex parte Voguel, 1 Atk. 132; Ex parte Oldknow, Co. B. L. 245; Ex parte Cobham, Ib. 246. See also Dutton *v.* Morrison, 17 Ves. 207; Ex parte Farlow, 1 Rose, 422. This rule was broken in upon by Lord Thurlow, who expressed his decided opinion, that the contrary course was the best as being the most legal; and he, in several instances (Ex parte Haydon, Co. B. L. 246; s. c. 1 Bro. C. C. 453; Ex parte Copland, Co. B. L. 248; s. c. 1 Cox, 420; Ex parte Hodgson, 3 Bro. C. C. 5; Ex parte Paige, Ib. 119; Ex parte Flintum, Ib. 120), allowed the joint creditors to prove and take dividends under a separate commission; his Lordship holding, that a commission of bankruptcy was an execution for all the creditors, and as the assignees under a separate commission might possess themselves, not only of the separate estate, but of the bankrupt's proportion of the joint estate, and as a joint creditor, having brought an action and recovered judgment against all his debtors, might have several executions against each, therefore the bankruptcy preventing his action with effect, should be considered a judgment for him as well as the others, and consequently that no distinction ought to be made between joint or

§ 378. What renders the foundation of the rule itself as one of natural justice and equity, and not of

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separate debts, but that they ought all to be paid ratably out of the bankrupt's property, which was composed of his separate estate, and his moiety or other proportion of the joint estate. See Dutton *v.* Morrison, 17 Ves. 207. Lord Rosslyn acted for some time upon the practice established by Lord Thurlow, but afterwards with some alteration; and upon great consideration he restored the principle of the rule, which had been adopted by Lord Hardwicke. In the case of Ex parte Elton (3 Ves. 242), Lord Rosslyn says: 'The plain rule of distribution is, that each estate should bear its own debts. The equity is so plain, that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make, to prove a joint debt upon the separate estate, must produce a bill in equity. It is not fundamentally a just distribution, nor a convenient distribution; because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance; it is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership, for it is money paid to one of the partners? They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved; but if they are arrested, they would pay it. It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first. I have no difficulty in ordering them to be admitted to prove, but not to receive a dividend.' This rule was afterwards acted upon by Lord Rosslyn (Ex parte Abell, 4 Ves. 837), and was adopted and followed by Lord Eldon in many subsequent cases, not because he was convinced of its propriety, or of its being better calculated to the due administration of justice than the doctrine introduced by Lord Thurlow; but he adhered to it, because it was the practice, and to avoid the mischief arising from shaking settled rules. Ex parte Clay, 6 Ves. 813, and the cases cited Ib. in note; Ex parte Kensington, 14 Ves. 447; Ex parte Taitt, 16 Ves. 193. According to the rule, therefore, which these decisions have established, if there is a joint fund, or a solvent partner, a joint creditor is not entitled to prove his debt under a separate commission for the purpose of receiving a dividend, without the Lord Chancellor's order. Mont. B. L. 230. And notwithstanding the joint property is of the most trivial amount, yet if there is such a fund of any, even the smallest description, and it is capable of being realized, the rule

mere assumed convenience, somewhat more open to criticism and question, is the character of the exceptions, to which it has given rise, some of which may be truly said to present the reasoning against it in a strong light, and to make it more difficult to be sustained. These exceptions allow a joint creditor to share, *pari passu*, with the separate creditors in every case, to which they are applicable. They are of three sorts; (1.) Where the joint creditor is the petitioner for a separate commission against the bankrupt partner; (2.) Where there is no joint estate, and no living solvent partner; (3.) Where there are no separate debts. In the first case, the petitioning creditor may prove his debt, and share, *pari passu*, with the separate creditors in the separate estate; in the second case, all the joint creditors enjoy the same privilege; and in the third case, all the joint creditors share, *pari passu*, with each other.[1]

§ 379. The first exception stands confessedly upon a ground of reasoning, which, if not purely artificial, applies at least with equal force in favor of the joint

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is inflexible, and there will be no departure from it. Ex parte Peake, 2 Rose, 54. See also In re Lee, Ib. in note. Lord Eldon, indeed, admitted this qualification of the rule, that 'If the property alleged to exist be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or, in point of expense, an unwarrantable attempt, that would authorize a departure from the rule; as in truth there would then be no joint property.' (Ibid.) And joint estate has been said to mean such estate only, as comes under the administration of the assignees to distribute, and not to extend to joint estate pledged for more than its value. Ex parte Hill, 2 N. R. 191, n." See also Collyer on Partn. B. 4, ch. 2, § 3, p. 623, 624, 2d edit.; Ex parte Cobham, 1 Brown, Ch. R. 576, Mr. Belt's note (1).

[1] Collyer on Partn. B. 4, ch. 2, § 3, p. 623 to 628, 634, 635, 2d edit.; Ex parte Tate, Co. Bank Laws, 253.

creditors in all other cases. The ground is, that a commission of bankruptcy is an action and an execution in the first instance.[1] To which it has been

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[1] Twiss v. Massey, 1 Atk. 67; Ex parte Crispe, 1 Atk. R. 133; Collyer on Partn. B. 4, ch. 5, § 3, p. 625, 626, 2d edit.; Ex parte Elton, 3 Ves. 238. — In this latter case Lord Loughborough (after Earl of Rosslyn) said: "Antecedent to these authorities, I should have thought it perfectly clear it could not be done; and, that the utmost length they could go was, that a joint creditor, where there is a separate commission, is to be admitted to prove, only for the purpose of assenting to or dissenting from the certificate, and receiving such surplus beyond the amount of the separate debts, as joint creditors would be entitled to claim, where there are two commissions. I doubt, whether it is possible to innovate upon that, which was the law formerly; for though a commission is an execution, and the joint creditor has such an interest as enables him to take out a separate commission, yet the consequence does not follow. There are cases antecedent to those cited. In Lord King's time it was determined, that a joint creditor might be a good petitioning creditor, though the commission is only against one partner; that the joint creditor does no more in taking his execution, passing over his action, than bringing the separate effects to be administered in bankruptcy. But it is not treated any longer as an execution at law; for the effects taken under it are not disposed of as at law, but fall immediately by the direction of the statute under the administration of this Court; which is to make an equitable distribution among the creditors, to admit all equitable claims upon the effects, and to divide them ratably. It has been long settled, and it is not possible to alter that, that each estate is to pay its own creditors. With regard to the creditor suing out the commission, the separate creditors cannot object to his having the effect of the execution he has taken out. He is precluded from suing at law; and it would be against all equity, having done it for their benefit, to refuse him the fruit of that for his own debt. But any other joint creditor is in exactly the case of a person having two funds; and this Court will not allow him to attach himself upon one fund to the prejudice of those who have no other, and to neglect the other fund. He has the law open to him; but if he comes to claim a distribution, the first consideration is, What is that fund from which he seeks it? It is the separate estate, which is particularly attached to the separate creditors. Upon the supposition, that there is a joint estate, the answer is, 'Apply yourself to that; you have a right to come upon it; the separate creditors have not; therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund.' There would be no great inconvenience, if he could put them in his situ-

replied with as great force, that it is true that a commission is not an execution, but an execution for all the creditors; that if a joint creditor had brought an

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ation as to the joint fund; but I doubt very much whether that is possible. For suppose in the case of A. and B., partners, the former remains solvent, the latter becomes a bankrupt, and there is a joint debt of £1,000. The creditor making his claim first against the separate estate, paying a dividend of 10s. in the pound, receives £500. Can the assignees claim against the solvent partner, what they have paid? His answer would be, they could only claim the same right the bankrupt could; and as against the bankrupt he is entitled to retain; he has paid his moiety of the partnership debt. If the case is turned the other way, and the creditor first sues the solvent partner, he recovers all the debt against him; and he has a right to come in as a separate creditor of the bankrupt to the amount only of a moiety of that debt; for a moiety only of the debt of the partnership he could have recovered against him if he had been solvent. That makes a very great difference to the separate creditors. I was led to consider another thing, — Is it possible to admit a separate creditor to take a dividend upon the joint estate ratable with the joint creditors? No case has gone to that, and it is impossible; for the separate creditor at law has no right to sue the other partner. He has no right to attach the partnership property. He could only attach the interest his debtor had in that property. If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy, but upon general equity, that the joint estate is applicable to partnership debts, the separate estate to the separate debts. Another difficulty is, whether really it is just to put it to the assigeees in behalf of the separate creditors, to assert the right of the creditor, making the claim, to go against the joint estate. The creditor coming in upon the separate estate is first to answer the question, why he does not go against the joint estate. It may be said, 'The law is open to you; it is not open to us. You put us to file a bill against the other partners to discover and apply the partnership fund. You have a much quicker remedy; sue the partnership. You need not wait the account. They will settle it rather than put you to that; at all events, you have a legal execution against them.' Another consideration is, that the great object of the law in establishing this sort of authority, in which I now sit, is to make a speedy distribution, and to avoid suits. The necessary consequence of admitting a joint creditor to prove against the separate estate, is in every such case to make a chancery suit; and the right of the separate creditors to the administration of their fund is frustrated." See, also, Ex parte Abell, 4 Ves. 837.

action against all the partners, he might have several executions against each, or at least a joint execution, which could be levied upon the joint property, and also upon the separate property of each of the partners.[1] What makes it still more artificial is, that if a

[1] Ex parte Hodgson, 2 Bro. Ch. R. 5; Dutton v. Morrison, 17 Ves. 207.—In this latter case Lord Eldon went into the reasoning of the various opinions, and said: "The case now before me must be regarded in this point of view. The question being as to the effect of the *quasi* execution, under a commission of bankruptcy against one partner, with reference to the interest of himself and two others, in a fund in the hands of the plaintiff. The jurisdiction in bankruptcy being both legal and equitable, let us see, whether we must not, of necessity, go a great way in this case; or admit, that we have already gone much too far in bankruptcy. The opinion of Lord Hardwicke was, that joint creditors could prove under a separate commission only for the purpose of assenting to, or dissenting from, the certificate, but not to receive dividends; and that they must file a bill for an account of the joint estate. The operation of that bill was to draw into the joint estate the share of that bankrupt partner, taken in execution, as far as bankruptcy can be so represented; and by the effect of the commission, the bill, and the decree, nothing could be divided among the separate creditors under the commission, but that which formed the separate share of the bankrupt after the account, and an application of the joint estate to all demands against it. Lord Hardwicke, therefore, must either have thought, that upon such a case it was clearly fit to say, that execution against one partner should not affect the application of the joint fund to the joint demands; or, as I rather believe, he found himself in a situation requiring him to cut the knot, and to make some rule that would, upon the whole, be most convenient. This subject took a different course at different periods, until the time of Lord Thurlow, who considered it with great anxiety, and, having consulted most of the Judges, expressed his decided opinion, that the contrary course was the best, as being the most legal; and therefore held, that the joint creditors should be admitted to prove, and take dividends, under a separate commission; that a commission of bankruptcy was an execution for all the creditors; that, if a joint creditor had brought an action against all the debtors, he might have several executions against each; and therefore, the bankruptcy, preventing his action with effect, should be considered as a judgment for him as well as the other; that he had a right to receive the dividends; and it was upon the assignees of the separate estate to bring their bill to have the account settled. The question afterwards came to be considered by Lord Loughborough, who got back to the old rule, and

joint creditor sues out a joint commission against all the partners, he can resort only to the joint funds of the partnership.[1]

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abided by it firmly; but great difficulties occurred of this sort. Lord Loughborough, adopting the principle of Lord Hardwicke's rule, did not adopt his practice; not putting the joint creditors to file a bill, bringing before the Court the assignees and the solvent partners, and taking the account in their presence; but taking this course, directing the assignees to take an account of the joint estate, and applying that to the discharge of the joint creditors, to ascertain the share of the residue, belonging respectively to the bankrupt and the solvent partners. From the nature of this proceeding, unless the solvent partners thought proper to come in and have the account taken before the commissioners, the Lord Chancellor, in bankruptcy, had no power to compel them; neither could the joint creditors, unless they thought proper to come in before the commissioners, be compelled, in that proceeding, to come in; and if the other partners did not, or could not, as in the instance of residence abroad, make themselves parties, the account upon ordinary principles could not bind them. I pressed the difficulty that would arise, if a joint creditor should bring an action and proceed to judgment. Would this Court interfere upon the ground, that there was an order in bankruptcy, to which he and the other joint creditors were not parties; and, to enforce that order, grant an injunction against execution in that action? That would be a question of great importance, if the law was as simple as it was supposed to be in the early cases upon this subject; that the assignees were tenants in common of a chattel with the solvent partner; and the creditor might satisfy himself out of the apparent interest. But, taking the law to be, that no more should be applied than the result of a general account, the only effect of the execution would be, that the creditor would have subjected himself to the general account, that was going on in another proceeding. The question then came before me; and upon consideration of all the authorities, I thought the best course for me to adopt (whether the best in principle I have often doubted) was, that the rule should continue to be applied, as it had been for some years in a course of application; and, therefore, I have not disturbed the practice, as it has of late prevailed. The result is, that now it has been understood for fifteen years, that, under a separate commission of bankruptcy, the other partners remaining solvent, an account shall be directed of the joint estate in the absence even of the other partners; and upon the application of any one joint creditor, whether the others choose it or not, the whole

[1] Ex parte Bolton, 2 Rose, R. 389, 390, cited in the preceding note.

§ 380. The second exception excludes the joint creditor, in all cases but one; and in that case two

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account being taken in the bankruptcy, the joint creditors shall be paid, *pari passu*, out of the joint estate; and the residue shall then be distributed only according to the respective interest of the partners; and, if the rule of law, where a creditor takes execution, is the same, perhaps we are not far wrong. In the course of this period there has been no instance of a creditor coming here, saying that he had a judgment, not executed, against a partner, and desiring to go on; nor has the case occurred in bankruptcy of a joint creditor claiming to set aside the execution under the commission by a prior act of bankruptcy; and desiring to have execution against all without any account. Such a case, if it occurred, must be dealt with upon much the same principle as this." I cannot find that Lord Thurlow's reasoning on the subject is anywhere given at large. All that remains consists of these notes and comments. It is manifest that Lord Eldon equally doubted with him, as to the solid foundation of the rule. Ex parte Clay, 6 Ves. 813; Ex parte Chandler, 4 Ves. 35; Ex parte Cobham, 1 Bro. Ch. R. 476, Mr. Belt's note (1); Ex parte Taitt, 16 Ves. 193, 195, 196; Gow on Partn. ch. 5, § 3, p. 312 to 315, 3d edit. Again, in Ex parte Bolton (2 Rose, R. 389, 390), Lord Eldon said: "Since the case of Ex parte Crisp, a decision now at least sanctioned by time, it has been clearly settled, that a joint creditor may take out a separate commission; and, taking out that commission, he has a privilege of election, either to make his proof against the separate or the joint estate. By a joint commission, on the other hand, he binds himself to resort to the joint property. The rule at law, as to executions, affords some analogy. If a creditor take out a joint execution, he cannot afterwards take out a separate execution; and a commission is in the nature of an execution; a joint commission being as an execution against all, a separate commission as an execution against the individual. If a creditor deliberately resorts to the process of a joint commission, he is, as a joint creditor, proceeding on a joint judgment and execution; and having once elected so to do, he cannot alter it. No determination approaches a case like the present. Here are two separate commissions at the instance of the same creditor. If it were the case of one separate commission, thus awarded, the creditor might say, I will take my debt out of either the joint or the separate estate; but to get at the joint estate, there must be a special order of the Chancellor. The joint property is, therefore, reached by circuity; and being thus looked at, if the creditor says, I will rank under this commission as against the joint estate, and so ranking, receives a dividend, say to the extent of fifteen shillings in the pound, he still remains the creditor of the solvent partner as to the five, and for that he may bring his action, or he may take out a commission; and

circumstances must concur and co-exist; (1.) That there is no joint estate; and (2.) That there is no living solvent partner. If there is any joint estate, however small it may be, if it is an available joint fund, and not purely a desperate and nominal joint fund, then the joint creditor is excluded. As for example, if the joint fund is absolutely worthless from the expenses of any attempt to get it in, or if it is pledged beyond its real value, it will be deemed a mere nullity; but not otherwise.[1] On the other hand, if there is no available joint fund, still, if there is a solvent partner, as the creditor has his right of action against him for a full satisfaction, it is said, that, therefore, he ought not to be allowed to come in competition with the separate creditors of the bankrupt.[2] Why he may not, it is not easy to say upon general reasoning, especially as all partnership debts are now treated in equity as several, as well as joint. But here, again, there is a peculiar qualification upon this part of the rule. The solvent partner must be living; for if he is dead, although his estate is solvent, yet, the joint creditors may come in upon the separate estate of the bank-

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taking out a commission, until he completely knows, and which until then he only indirectly knows, the state of the joint accounts under that commission, he cannot be said deliberately to have elected. I think, therefore, he is entitled to reconsider his mode of proof; and refunding the joint dividend with the interest, let the proof stand against the separate estate." See also Collyer on Partn. B. 4, ch. 2, § 5, p. 634, 635, 3d edit.

[1] Collyer on Partn. B. 4, ch. 2, § 3, p. 626, 627, 2d edit.; Ex parte Leaf, 1 Deacon, R. 176; In re Lee & Armstrong, 2 Rose, 54; Ex parte Peake, 2 Rose, 54; Ex parte Hill, 5 Bos. & Pull. 191, a; Ex parte Janson, 3 Madd. R. 229; Ex parte Kensington, 14 Ves. 447; In re Marwick, Daveis's R. 229.

[2] Collyer on Partn. B. 4, ch. 2, § 3, p. 626, 627, 2d edit.; Ex parte Sadler & Jackson, 15 Ves. 52, 56; Ex parte Kensington, 14 Ves. 447.

rupt, *pari passu*, with the separate creditors.[1] The like rule will apply to the case of joint debtors, who are not partners, under the like circumstances.[2]

§ 381. The third exception stands, if possible, in its actual application, upon more subtle and refined grounds. It is not necessary here to make out a case, where there are absolutely and literally no separate debts at all. It is sufficient, that they are few and inconsiderable in amount, and that the joint creditors undertake to pay them all, and do discharge them; so that they no longer stand in their way as subsisting claims, impeding their rights.[3]

§ 382. Such is the acknowledged state of the authorities as to the general rule, and the exceptions to it as to the respective rights of joint creditors and separate estates of the bankrupt. After the repeated doubts which have been expressed upon the subject, by the most eminent judges, it is not, perhaps, too much to say, that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole sytem of our jurisprudence. Such as it is, however, it is for the public repose, that it should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations.

§ 383. But although the joint creditors and the separate creditors are not entitled to come in, *pari passu*, upon the joint and separate estates of a bankrupt, for

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1 Collyer on Partn. B. 4, ch. 2, § 3, p. 627, 2d edit.

2 Ibid.

3 Collyer on Partn. B. 4, ch. 2, § 3, p. 627, 2d edit.; Ex parte Chandler, 9 Ves. 35; Ex parte Taitt, 16 Ves. 193; Ex parte Hubbard, 13 Ves. 424. See also Rice *v.* Barnard, 20 Vermont R. 479.

a dividend thereof; yet they are in all cases entitled to come in and prove their debts against his estate, for the purpose of assenting to or dissenting from his certificate; but not to vote in the choice of assignees.[1] And this is upon a principle of natural justice, since the certificate, when given, will operate as a discharge of the bankrupt equally against his joint and his separate creditors.[2]

§ 384. The question often occurs in bankruptcy, as to the rights of creditors, who are at law both joint and several creditors of the partners, or, in other words, to whom the partners are in law jointly and severally indebted upon joint and several securities and contracts, whether they are entitled to prove both against the joint estates and against the separate estates of the bankrupt or bankrupts. And here the general rule is now firmly established, that they shall not in equity be allowed to prove their debts and take dividends upon the joint estate, and also upon the separate estate; but they shall be restrained, and put to their election to prove and take dividends from the one or the other.[3] When they have once made this election, they are excluded from any dividend of the other fund, unless there remains a surplus after the discharge of all the debts having a preference thereon.[4] However, before

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[1] Gow on Partn. B. 5, § 3, p. 280, 2d edit.; Id. p. 329; Ex parte Taitt, 16 Ves. 193; Watson on Partn. ch. 5, p. 334, 335, 2d edit.

[2] Ibid.

[3] Gow on Partn. ch. 5, § 3, p. 286, 287, 3d edit.; Cook's Bankrupt Laws, 259, 4th edit.; Ex parte Bank, 1 Atk. 107; Ex parte Rowlandson, 3 P. Will. 405; Ex parte Bond, 1 Atk. 98; Collyer on Partn. B. 4, ch. 2, § 8, p. 561, 2d edit.; Id. B. 4, ch. 2, § 4, p. 630 to 632; Id. p. 634 to 637; Watson on Partn. ch. 5, p. 289, 295, 2d edit.

[4] Ibid.

any such creditor can be put to his election, he is entitled to a reasonable time to inquire into and ascertain the true state of each fund; and even after he has made an election, he will sometimes be allowed to recall it upon equitable circumstances, when it will not interfere with the positive rights actually acquired and fixed in others.[1]

§ 385. The doctrine thus established does not, any more than the preceding, seem to stand upon any solid ground of equity or general reasoning. It has been supported upon some supposed analogy to the rule of law in cases of this sort, where the creditor may sue all the partners at law, and have a joint execution against all, or he may sue each partner separately at law, and have a separate execution against each. But he cannot do both; that is, he cannot at law at the same time sue them all in a joint action, and each one separately in a separate action; but he will be put to an election of his remedy by the very forms of pleading.[2] And it is added,

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[1] Gow on Partn. ch. 5, § 3, p. 286, 288, 289, 3d edit.; Ex parte Bond, 1 Atk. 98. — We are here to understand, that the election of the remedy by the creditor against the joint or the several estate is strictly confined to cases of one and the self-same debt; and does not apply, where the creditor has two distinct debts, arising under separate and independent contracts. Collyer on Partn. B. 4, ch. 2, § 4, p. 632, 2d edit.; Id. § 5, p. 634 to 638, 2d edit.; Ex parte Edwards, 1 Mont. & McArth. 116.

[2] Gow on Partn. ch. 5, § 3, p. 286, 287, 3d edit.; Collyer on Partn. B. 4, ch. 2, § 4, p. 630, 631, 2d edit.; Id. p. 634, 635; Ex parte Rowlandson, 3 P. Will. 405, 406. — On this occasion Lord Talbot stated his opinion to be: "That as at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly, and, on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other; so, by the same reason, the petitioner in the present case ought to be put to his election under which of the two commissions he would come; and that he should not be permitted to come under both; for then he would have received more than his share.

that the general end of the bankrupt laws is to provide

But his Lordship said he would hear counsel, if they had any thing to object against this order." And again he added: "In the principal case, the bond upon which the petitioner would seek relief under the separate commission, was not only for the same debt, but given by both the parties; and the plea in abatement would have been proper, had the bond been sued at the same time both as a joint and several bond, which cannot be where there is only a separate bond. Then taking this to be the rule at law, that a joint and several bond cannot be sued at one and the same time both jointly and severally, but that the obligee must make his election; so it ought to be (he said) in the principal case. And this would best answer the general end of the statutes concerning bankrupts, which provide that all debts shall be paid equally, as in conscience they are all equal; that it is upon this foundation that debts of a partnership have been ordered to be first paid out of the partnership effects; and that afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versâ*, the separate creditors are to come first on the separate effects of the partners, and if these are not sufficient then on the joint effects, after the partnership creditors are paid." And therefore, the Reporter adds, "That there might be an equality in the principal case, his Lordship ordered that the petitioner should make his election, whether he would come in for a satisfaction out of the partnership, or the separate effects, but not out of both at the same time; however, his having received his dividend out of the joint effects, on the joint commission, whilst this matter was in suspense, was not to bind him; and provided he brought that back again, he might come in for a satisfaction out of the separate effects, and he to have a month's time to make his election." Lord Hardwicke, in Ex parte Bond (1 Atk. 98), said: "It was objected upon the last day of petitions, that this would be contrary to proceedings at law upon a joint and several bond, where the creditor may proceed against both obligors at the same time, till his debt is fully satisfied. And to be sure it is so at law; but in bankrupt cases, this Court directs an equality of satisfaction. Consider it on the footing of a joint estate first; joint creditors are entitled to a satisfaction out of the joint estate, before separate creditors; but then they have no right to come upon the separate estate for the remainder of their debts, till after separate creditors are satisfied. What would be the consequence, if the petitioners should be admitted to come on both estates at the same time? Why, then, these creditors would draw so much out of the separate estate, as would be a prejudice to other joint creditors, who have an equal right to come upon the separate estate with themselves; and by that means I should give the petitioners a preference to other creditors, when the act of parliament and the equity of this Court incline, that all persons should have an equal satisfaction, and not one more than another." See also Ex parte Wildman, 1 Atk. 109.

for the payment of all debts equally, as in conscience all are equal; and equality is equity.[1]

§ 386. Now (to say the least of it), this is assuming the very ground of controversy, and not establishing it by any satisfactory reasoning. With what justice can it be said, that a contract, which is merely joint or merely several, shall stand upon an equal footing, as to right and remedy, with one that is both joint and several? The very object of the latter is to provide a superior remedy to enforce it; and why should any Court deprive the creditor of the very benefit which the debtors had stipulated to give him, or restrain him from using all his rights? Courts of Equity generally act upon an opposite principle, and give a broader effect to joint partnership contracts in favor of the creditor, even when his remedy is, by the death of one of the partners, gone at law.[2] However, the doctrine is now too firmly established in practice to be shaken.

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[1] Ibid. — The doctrine, compelling the creditor to elect, equally applies to the case of a joint creditor, who takes the separate personal contract or security of one of the debtors, as collateral security for the joint debt. Ex parte Roxby, 1 Montagu on Partn. 124; Gow on Partn. ch. 5, § 3, p. 287, 3d edit.; Collyer on Partn. B. 4, ch. 2, § 5, p. 635, 636, 2d edit. But see In re Plummer, 1 Phillips, Ch. R. 56, 59; Post, § 389.

[2] Ante, § 384, 385, and note (2). — Lord Eldon held a pointed opinion against the whole doctrine; but at the same time he considered it so well established in practice by authority, that he ought not to depart from it. In Ex parte Bevan (9 Ves. 223, 224), he said: "It is not necessary to decide the other question, as to the joint and several proof. If it was, I am not perfectly satisfied with the authority that has been stated. The reasoning goes upon this, that a joint and separate action could not be brought at law. But surely the distinction is then, that where a joint and separate bond is given, and another security, several from each, there, as two actions might be brought, the rule in bankruptcy should be different. I think I have heard, that in the case cited in Peere Williams, the only separate creditor was he who took out the commission; and it appears by the book, that the joint creditors prayed that he might deliver over to them the effects, which

§ 387. But, although, generally, where a creditor holds the joint contract or personal security of the firm, and likewise the separate contract or personal security of individuals composing the firm, he is compelled, upon the bankruptcy of some of them, to elect, whether he will consider them as his joint or as his separate debtors, and proceed accordingly; yet this rule is not without exceptions. For, where a creditor holds the joint contract or personal security of a firm, and also the several contract or personal security of some of its members, and the latter likewise form a distinct partnership *inter sese*, there are cases, where the creditor may have a double remedy. Thus, if A., B., C., and D. trade under the firm of A., B. & Co., and C. and D. are in a distinct partnership, and the firm of A., B. & Co. draw bills upon C. and D., who accept them, the holder of such bills may prove them under the bankruptcy of C. and D., and afterwards may bring his action on the bills against A., B. & Co.[1] So, if a creditor of A. and B. should take out

was refused; and it was said, that he should have the effects applied to his separate bond. And that if that is the case, the rule is quite right; for he would have a right to take the separate effects, if not to the detriment of other separate creditors." And again, in Ex parte Bevan (10 Ves. 106, 109), he said: "The principle seems obvious; yet in bankruptcy, for some reason not very intelligible, it has been said the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and a several security, should not go against both estates. But it is settled that he must elect. By his election to go against the joint estate, the effect to the joint creditors is very different from what it would have been, if he had elected to go against the separate estate; and the question is, whether, if he elects to go against the joint estate, and thereby participates with the joint creditors, that participation, arising from his election, has not in practice been treated as a consideration for the rest of the joint creditors; entitling them to go along with him upon the separate estate, when he afterwards goes against that estate."

[1] Ex parte Parr, 1 Rose, 76. See also In re Plummer, 1 Phillips, Ch. R. 56, 89; Post, § 389.

a separate commission against A., and receive a dividend under that commission out of the joint estate, he may bring an action against the other partner for the residue.[1]

§ 388. Cases sometimes occur upon written negotiable instruments, such as bills of exchange and promissory notes, where, in reality, all the parties are partners, and the bills or notes are drawn, or indorsed, or accepted, upon their joint partnership account, and yet the parties appear only to be separately bound upon the face of the instrument, as drawers, or as indorsers, or as acceptors. In such cases, a question has been made, whether the creditor has a right in bankruptcy to prove his debt against the estates of all the respective parties (which is called double proof), or he must elect to prove against one only of the estates. It has been held, that if the creditor is, at the time of taking the negotiable instrument, ignorant of the actual connection between the parties in that instrument, he is entitled to the double proof.[2] But, if he is not so ignorant, it seems doubtful, in the present state of the authorities, whether he is entitled to the double proof, or not.[3] Be this as it may, it is very certain, that the

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[1] Heath *v.* Hall, 4 Taunt. 326; Young *v.* Hunter, 16 East, 258; Collyer on Partn. B. 4, ch. 2, § 7, p. 645, 2d edit.; Gow on Partn. ch. 5, § 3, p. 289, 3d edit.

[2] Collyer on Partn. B. 4, ch. 2, § 8, p. 648, 649, 656, 2d edit.; Gow on Partn. ch. 5, § 3, p. 289, 3d edit.; Ex parte Benson, Cook's Bankr. Laws, p. 263; Ex parte La Forest, Id. p. 261; Ex parte Bonbonus, 8 Ves. 546.

[3] Collyer on Partn. B. 4, ch. 2, § 8, p. 649 to 651, 2d edit.; Gow on Partn. ch. 5, § 3, p. 288, 3d edit. — Mr. Collyer (Collyer on Partn. B. 4, ch. 2, § 8, p. 648 to 651, 2d edit.) has stated the cases as follows. "The leading case on this subject is Ex parte La Forest, Cook's Bankr. Laws, 261. There, Corson and Gordon, partners and turpentine manufacturers, entered into partnership with Whincup and Griffin, soap manufacturers. The latter

creditor cannot prove his debt against the joint and

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business was carried on under the firm of Whincup & Griffin. A joint commission was issued against the four, under which they were found bankrupts; and the assignees possessed themselves of the joint fund of the four, and also the joint fund of Corson & Gordon, and their respective separate estates. Corson & Gordon, in their partnership firm, drew bills of exchange upon the firm of Whincup & Griffin, who accepted such bills. The petitioners discounted many of these bills. The petitioners alleged, that, at the time of such discount, they were ignorant of any partnership existing between the four; but that they considered Corson & Gordon, the drawers, and Whincup & Griffin, the acceptors, as two distinct firms, and thought that they had the security of the funds of both those firms. The petitioners applied to the commissioners to be admitted to prove against the respective joint estates of Corson & Gordon, and of Whincup & Griffin; but the commissioners refused, conceiving that the bills ought to be proved only against the joint estates of Whincup, Griffin, Corson, and Gordon. Lord Loughborough held, that, admitting the allegation of ignorance on the part of the petitioners be true, they were entitled to the proof which they required. Again, A., B., and C. were partners in a cotton manufactory, and B. and C. carried on a distinct trade in partnership, as grocers. The petitioner sold goods to B. and C. as grocers, for which they remitted to him a bill drawn by A. in their favor, upon one Z., and indorsed by B. and C. Z. accepted the bill; but it was protested for non-payment. The drawer, indorsers, and acceptor, all became bankrupts. The petitioner did not know that A. had any connection in trade with B. and C. Lord Loughborough ordered that the petitioner should be at liberty to prove the amount of the bill against the joint estate of B. and C., and also against the separate estate of A., and be paid dividends upon both estates. Ex parte Benson, Cook's Bankr. Laws, 263. Again, five persons, trading under the firm of C. & Co., drew a bill of exchange on two of the members of the copartnership, who carried on a distinct trade, as H. and G. The bill was accepted, negotiated, and, in the course of circulation, came into the hands of the petitioner, without any knowledge, on his part, of the connection between the parties. Upon the bankruptcy of C. & Co. the petitioner claimed to prove both against the drawers and acceptors. Lord Eldon held, that the petitioner, as ignorant of the connection of the parties, were entitled to such proof. Ex parte Adam, 2 Rose, 36. In all these cases, the partners, who appeared as distinct parties to the bills, were also in distinct partnerships; and yet the holders of the bills, in order to obtain double proof, were required to prove their ignorance, that these distinct partnerships also formed an aggregate partnership. Nevertheless, according to a learned writer, Lord Eldon has determined, that, where the firms are in fact distinct, it is not material that the ignorance of the holder, that the same parties were also united in one firm, should be requisite to entitle him

against the separate estates of the same parties; but he must elect to go against the one, or the other.[1]

§ 389. Another question may arise in bankruptcy, where a creditor has a pledge or mortgage or other security upon the estate of the bankrupt for his debt, whether he can retain it, and proceed in bankruptcy for the amount, or not. And, here, a doctrine prevails, which seems equally consonant to justice and common sense; and that is, that the creditor in such case may, if he chooses, surrender up the pledge or mortgage or other security, and come in under the commission, for his whole debt; or, he may have the pledge or mortgage or other security sold, and if it is insufficient to pay the whole debt, he may prove against the estate

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to proof. Eden on Bankr. Law, 182. Now, although this remark does not seem to be supported by any express authority; yet it is justified by several dicta of Lord Eldon, and by the case of Ex parte Walker (1 Rose, R. 441), which is in point. There A., a sole trader, B. and C., partners, and D., also a sole trader, engaged in a joint adventure; and for a joint purchase of goods by them, the vendor, with a knowledge of their joint interest, received in payment a bill drawn by A. on, and accepted by B. and C.; Lord Eldon held, that on the bankruptcy of A., and of B. and C., the vendor was entitled to prove the bill against both their estates. On other occasions, likewise, Lord Eldon appears to have adverted to double proof, without ever referring to the ignorance of the holder of the double security, that the distinct firms constituted one general firm. Ex parte Bonbonus, 8 Ves. 546. On the other hand, there is a recent case, in which Sir George Rose is reported to have said, that the holder of a bill is not entitled to double proof, if he knew the different persons whose names appear upon it to be all members of one joint firm, 2 Deac. R. 261. Upon the whole, it seems still open to contend, that where a bill is drawn by some of the partners upon the others, or upon the whole firm, or *vice versâ*, and the bill purports, and the fact is, that the drawers and acceptors likewise constitute distinct firms respectively, in such case, the holder, whether ignorant or not of the aggregate connection of the parties, is entitled to pursue the contract appearing on the face of the bill, and to prove against both the estate of the drawer and that of the acceptors." See Watson on Partn. ch. 5, p. 274 to 276, 2d edit.

[1] Collyer on Partn. B. 4, ch. 2, § 8, p. 651 to 654, 2d edit.

for the deficiency.[1] But as the established rule in bankruptcy is, that the deduction of a pledge or mortgage or other security is never made, except when it is the property of the bankrupt, it has been held, as a consequence of that rule, that in the case of a separate pledge or mortgage or security of property made for a joint debt, either by a partner or by a third person, the security may be retained, although the whole joint debt be proved under the commission.[2]

§ 390. It was also for a long time a matter of doubt, whether, if a firm be indebted to one of the partners, the creditors on the separate estate of that partner should be admitted as creditors on the partnership estate, in competition with the joint creditors; Lord Hardwicke conceived and held,[3] that, where money had been lent to the partnership by a partner, who afterwards became bankrupt, the separate creditors of the latter might prove the amount of the loan, as a debt against the joint estate. Lord Thurlow, however, thought differently; and, in a subsequent case,[4] he decided, that proof could not, under such circumstances, be made. He proceeded upon the principle, that the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; and that it was a clear and well-established rule, that the individual partner could not himself prove against the joint

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[1] Collyer on Partn. B. 4, ch. 2, § 4, p. 633, 2d edit.; Id. ch. 2, § 7, p. 645, 646; Ex parte Gellar, 2 Madd. R. 262; Ex parte Bennett, 2 Atk. 527; Ex parte Parr, 1 Rose. R. 76; Ex parte Goodman, 3 Madd. R. 373; In re Plummer, 1 Phillips, Ch. R. 57, 59; Ante, § 389.

[2] Collyer on Partn. B. 4, ch. 2, § 7, p. 645 to 647, 2d edit.; Ex parte Parr, 1 Rose, R. 76; Ex parte Peacock, 2 Glyn & Jam. 27; In re Plummer, 1 Phillips, Ch. R. 57, 59; Ex parte Bowden, 1 Deacon & Chitty, R. 125.

[3] Ex parte Hunter, 1 Atk. 223.

[4] Ex parte Lodge, Cook's Bankr. Laws, p. 505; s. c. 1 Ves. Jun. 166.

estate in competition with the creditors of the firm, who were in fact his own creditors, and thereby take part of the fund to the prejudice of those, who were not only creditors of the partnership, but of himself. Therefore, where there was a joint commission against two partners, and a separate commission against one of them, and the assignees under the separate commission petitioned to be admitted creditors under the joint commission for a sum of money brought by the bankrupt, whom they represented, into the partnership, beyond his share, and as being, therefore, a creditor upon the partnership, for that sum; Lord Thurlow refused it, upon the ground, that proof of a debt due to an individual partner could not be allowed to come in conflict with the proofs of the joint creditors.[1] The rule introduced by Lord Thurlow, has since his time been in many cases acted upon and confirmed.[2]

§ 391. The like question may arise in the converse case, where the joint creditors seek to prove a debt, due from a single partner to the partnership, against the separate estate of that partner. And here, also, it is now the settled rule, that, where one partner has become indebted to the firm, or has taken more than his share out of the joint funds, the joint creditors are not to be admitted to prove against the separate estate of that partner, until his separate creditors are satis-

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[1] Ex parte Burrell, Cook's Bankr. Laws, p. 503; Ex parte Parker, and Ex parte Pine, Ibid.; Gow on Partn. ch. 5, § 3, p. 290, 291, 3d edit.

[2] Ex parte Reeve, 9 Ves. 589; Ex parte Adams, 1 Rose, 305; Ex parte Harris, Ibid. 438; Ex parte Sillitoe, 1 Glyn & Jam. 382; Gow on Partn. ch. 5, § 3, p. 290, 291, 3d edit.; Rodgers v. Meranda, 7 Ohio St. R. 193; Watson on Partn. ch. 5, p. 278, 279, 280, 3d edit. — In this and the three succeeding sections, I have followed for the most part literally the language of Mr. Gow, as at once full and accurate upon the points.

fied, unless it can be shown, that in drawing out the money, the partner has acted fraudulently, with a view to benefit his separate creditors, at the expense of the joint creditors.[1]

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[1] Gow on Partn. ch. 5, § 3, p. 316, 317, 318; Watson on Partn. ch. 5, p. 280 to 285, 2d edit. Mr. Gow on this point says: "The law sanctioned by the authorities of Lord Talbot, and Lord Hardwicke, formerly was, that if the debt, raised by the partners against an individual partner, arose out of contract, as upon a loan by the partnership to him, the joint creditors might be admitted to prove against the separate estate in competition with the separate creditors. But the opinions entertained by those learned Judges have been receded from in more modern times; and the settled doctrine now is, that if the claim arise out of contract, the estates are to be administered jointly and separately, as they are actually constituted at the time of the bankruptcy; the joint creditors not being permitted to recall into the joint fund, what one partner has by contract, express or implied, subtracted from the joint, and applied in augmentation of his separate estate. This rule was introduced by Lord Thurlow, who, having much considered the question, finally determined, that the assignees on behalf of the joint, could not prove against the separate estate, unless the partner had taken the joint property, with a fraudulent intent to augment his separate estate. Thus, where Fendall was a dormant partner with Lodge, and Lodge took money from the partnership to a considerable amount, without the knowledge of Fendall, who did not intermeddle in the partnership business, Lord Thurlow, after taking time to consider, thought he could not permit the assignees, under a joint commission, to prove against the separate estate of Lodge, without deciding upon a principle, that must apply to all cases, and constantly occasion the taking an account between the partners and the partnership in every joint bankruptcy. He said, that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that Lodge, with a view of swindling Fendall out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been different; and the petition, on the part of the joint creditors, to prove against the separate estate, was dismissed. The principle established by Lord Thurlow's decision has been acknowledged, and followed by Lord Eldon; and it is now an indisputable rule in bankruptcy, that, where the debt from one partner to the partnership was incurred with the privity of his copartners, proof by the joint against the separate estate will not be admitted." See also Ante, § 384, 385, note (1), § 390; Lord Eldon's opinion in Ex parte Harris, 2 Ves. & Beam. 212, 213, cited.

§ 392. But although in cases of contract, in which the joint estate is increased at the expense of the separate estate, the funds are administered as they are constituted at the time of the bankruptcy; yet there are circumstances under which the separate creditors will be permitted to prove, against the joint estate, a debt due from the partnership to the individual partner.[1] To induce a relaxation of the rule, however, it must be made out, that the separate effects, creating the debt, were obtained from the separate to augment the joint estate, either by actual fraud, or under circumstances, from which the law will imply fraud; and, in a legal sense, every appropriation by the firm, as contradistinguished from a taking either by contract, or by loan, is considered fraudulent, if it be made without the express or implied authority of the individual partner.[2]

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[1] Ex parte Harris, 1 Rose, 438; s. c. 2 Ves. & Beam. 240; Ex parte Younge, 3 Ves. & Beam. 31; s. c. 2 Rose, 40; Ex parte Cust, Cook's Bankr. Laws, p. 506.

[2] Ex parte Reid, 2 Rose, 84; Gow on Partn. ch. 5, § 3, p. 292, 3d edit.; Watson on Partn. ch. 5, p. 280 to 282, 2d edit.; Collyer on Partn. B. 4, ch. 2, § 10, p. 666 to 672, 2d edit.; Ex parte Harris, 2 Ves. & Beam. R. 213.— In Ex parte Harris (2 Ves. & Beam. R. 210, 212), Lord Eldon said: "There has long been an end of the law which prevailed in the time of Lord Hardwicke; whose opinion appears to have been, that, if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other in each case. That has been put an end to, among other principles, upon this certainly; that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case no proof to affect the creditor, though the individual partners may certainly have the right against each other. The

§ 393. Cases also may arise, independently of any fraud, in which the separate creditors will be entitled to relief, and to make proof of their debts against the joint estate. In cases of dormant partnership, it is a general rule, that the creditors who have dealt with the ostensible partner, not knowing that there is any dormant partner, have a right to treat their debts as joint debts, or as separate debts, and have an election to prove the same against the joint estate, or against the separate estate of the ostensible partner.[1] Under

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opinion of Lord Talbot seems also to have been in favor of this proof. But in and previously to the year 1790 great discussion took place at this bar; the result of which, according to Lord Thurlow's opinion, was expressed particularly in the case of Dr. Fendall and Lodge. The former, a physician, embarked a very large property, his whole fortune, in a partnership with Lodge, whom he permitted to have the whole management; and, a bankruptcy ensuing, Lord Thurlow held, that as it was with the knowledge and permission of Fendall, that the whole management of the property was with Lodge, he was authorized to do as he thought fit with the partnership property; and Fendall, therefore, must abide the consequences of what had been done most improperly, but, under his own authority, most imprudently given; and there could, therefore, be no proof. The law has been clear from that time, that, to make out the right to prove by the one estate, or the other, it must be established, that the effects, joint or separate, have been acquired by the one, or the other, improperly and fraudulently in this sense, that they have been acquired under circumstances from which the law implies fraud; or in this sense, to increase the separate estate of one partner, that he meant fraudulently to increase his own means out of the partnership estate. Lord Thurlow by 'fraud' intended to express what he thought necessary to distinguish, that from taking by contract, or loan, or without the express or implied authority of the other partner, and that such act would amount to fraud. Upon this case, I formerly expressed my opinion; and I now lay down, that, if in either the expressed or implied terms of an agreement for a partnership there is a prohibition of the act, and it is done without the knowledge, consent, privity, or subsequent approbation of the other partner, before the bankruptcy, and to the intent to apply partnership funds to private purposes, that is *primâ facie* a fraud upon the partnership."

[1] Collyer on Partn. B. 4, ch. 2, § 5, p. 639, 2d edit.; Ex parte Reid,

such circumstances, if such creditors should elect to prove them against the separate estate of the ostensible partner, the separate creditors of the latter will be entitled to prove their debts against the joint estate, and to receive an equivalent out of any surplus of the joint estate, which may remain after satisfying the joint debts; for the same rule prevails in bankruptcy, as is adopted by Courts of Equity generally, that the mere election of a creditor, who has a right to resort to two funds, shall not deprive other creditors, who can resort but to one of those funds, of their just rights; but the latter shall be allowed, by way of substitution, to obtain the like benefit against the other fund, as the original creditor would have, if he had not made such an injurious election.[1] Therefore, where a joint commission issued against A. and B., A. being a dormant partner, and the joint creditors resorted to the separate estate of B., thereby diminishing that separate estate, and exonerating the joint estate of A. and B., so as to produce a surplus of it, it was held, that the separate creditors of B. had a lien upon that surplus to the extent to which their funds had been diminished by this election and resort of the joint creditors.[2]

§ 394. Another relaxation of the rule, that a partner cannot prove against a firm, is admitted where there is a minor partnership, or house of trade, consti-

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2 Rose, R. 84; Ex parte Norfolk, 19 Ves. 458; Ex parte Watson, 19 Ves. 459; Gow on Partn. ch. 4, § 1, p. 178, 179, 3d edit.; Id. ch. 5, § 3, p. 261, 262. See Van Valen v. Russell, 13 Barbour, 590.

[1] Ex parte Reid, 2 Rose, R. 84; 1 Story on Eq. Jurisp. § 558 to 561; Id. § 663 to 668; Gow on Partn. ch. 5, § 3, p. 292, 3d edit.; Collyer on Partn. B. 4, ch. 2, § 5, p. 639, 2d edit.

[2] Ex parte Read, 2 Rose, R. 84.

tuted of persons who are members of a larger firm, and there are distinct dealings between the distinct houses of trade, and both firms become bankrupt, the one being indebted to the other in respect of such dealings; in such a case proof may be made of the debt, in the same manner as if the dealings had been among strangers.[1] But the question, what is a dealing in a distinct trade, is always to be looked at with great care, for the proof is admissible on behalf of the separate trade against the aggregate firm, only in respect of dealings between trade and trade. If an individual partner, who is a separate trader, should lend money to his partnership, the strict rule would immediately apply to him, and shut him out from the benefit of proof; for if it were sufficient to state, in order to bring the case within the exception, that the partner would not have lent the money, but as a separate trader, the general rule would be at an end. It is obvious, therefore, that the right of proof must be confined to distinct dealings in the articles of distinct trades; since a more extended relaxation of the rule would, in its consequences, lead to the destruction of the rule itself.[2] Therefore, where two partners of a large banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of moneys procured for the benefit of the aggregate firm, on the credit of the indorsement of the separate firm, it was held, that no proof could be made on behalf of the firm of the two

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[1] Ex parte Hargreaves, 1 Cox, 440; s. c. cited 6 Ves. 123, 747, and 11 Ves. 414; Ex parte Ring, Ex parte Freeman, Ex parte Johns, Cook's Bankr. Law, 509; Ex parte St. Barbe, 11 Ves. 413; Ex parte Hesham, 1 Rose, 146; Ex parte Catesby, 2 Christ. Bankr. Law, 286.

[2] Ex parte Williams, 3 Montagu, Deac. & De Gex, R. 433.

against the aggregate firm in respect of that debt.[1] If the firm consists of two persons only, and one carry on a separate trade; as they are both liable for the same joint debts, the solvent partner is not entitled to prove, under the commission against his copartner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. It would be otherwise in the case of a firm of A., B., C., and D., proving against the firm of A., B., C., and E.; for the former would not be liable for the joint debts of the latter firm.[2]

§ 395. The subject of set-off in bankruptcy, as applicable both to separate debts and to joint debts, might be here introduced and expounded. But as it turns mainly on the positive provisions of the Statutes of Bankruptcy, as to mutual debts and credits, or on the doctrines, adopted by Courts of Equity, and founded upon the equities arising in particular cases, it seems more appropriate for Commentaries of a more extended character. It may, however, be stated, that at law, and in bankruptcy, and indeed in equity generally, there can be no set-off of joint debts against separate debts, unless there be some special agreement between the parties to that effect, or some equitable circumstances, creating it in the particular case.[3]

§ 396. We have already seen, that in common

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[1] Ex parte Sillitoe, 1 Glyn & Jam. 374.

[2] Ex parte Adams, 1 Rose, 305; Gow on Partn. ch. 5, § 3, p. 292, 293, 3d edit.; Watson on Partn. ch. 5, p. 286 to 288, 2d edit.; Collyer on Partn. B. 4, ch. 2, § 9, p. 664, 665, 2d edit.; Id. B. 4, ch. 2, § 10, p. 666 to 672; Id. p. 673 to 678.

[3] Collyer on Partn. B. 4, ch. 2, § 11, p. 678 to 685, 2d edit.; 2 Story, Eq. Jur. § 1430 to 1444; Watson on Partn. ch. 5, p. 339 to 350, 2d edit.; Gow on Partn. ch. 3, § 1, p. 137 to 139, 3d edit.; Id. ch. 5, § 3, p. 331 to 340.

cases of a dissolution, it is competent for the partners to agree between themselves, either originally by their articles of partnership, or by their arrangements at its dissolution, that one partner may or shall take the whole partnership property at a valuation; and the assignment thereof, when made *bonâ fide* in either way, will be valid and obligatory upon the creditors.[1] But in cases of bankruptcy, the rule is otherwise; for the policy of the bankrupt laws intervenes, and prevents any effect being given to any such stipulations or arrangements. The assignees are entitled to the interest of the bankrupt in his property, whatever it may specifically be, at the moment of the act of bankruptcy. And no agreement made between him and his partners, in contemplation of bankruptcy, is permitted to interfere with their rights. For, although the owner of property may generally, upon his own voluntary alienation of that property, qualify the interest of his alienee, by a condition to take effect upon the bankruptcy of the latter; yet it would defeat the very objects of the bankrupt laws, to allow a party to qualify his own interest therein, while it remains his absolute property, by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment, delay, or injury of his creditors; for such an event, by mere operation of law, takes away from him entirely the *jus disponendi*, and transfers it to the assignees for the equal benefit of all his creditors.[2]

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[1] Ante, § 208, 358, 359, 372, 373.

[2] Gow on Partn. ch. 5, § 3, p. 300, 301, 3d edit.; Collyer on Partn. B. 2, ch. 2, § 2, p. 146, 2d edit.; Wilson *v.* Greenwood, 1 Swanst. R. 484. — I have stated the doctrine positively in the text, deeming it the just result of the reasoning in the authorities, whether the stipulation be in the origi-

§ 397. Passing from this subject, let us, in the next place, proceed to the consideration of another subject

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nal articles of partnership, or be made afterwards. Mr. Gow and Mr. Collyer speak of it as a matter open to doubt, where the stipulation is in the original articles. In the case of Wilson *v.* Greenwood (1 Swanst. R. 474, 481, 482), Lord Eldon said: "In this case, the first question is, whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, that provision would be good. I will not say, that it would not; but I have heard nothing to convince me that it would. From the original deed, it is clear, that the intention of the parties was not, as the defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares that, in case of bankruptcy, the concerns are to be wound up in the same way as if no special provision was made. On this agreement, the parties proceed till the execution of another deed, which, in one sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone. But I have no doubt, from the face of it, that it was, in a strict sense, in contemplation of bankruptcy; for it contains a recital, which cannot be believed by any one, who looks at the original deed, that the parties to that deed intended the same provision in cases of bankruptcy and insolvency, as in the case of dissolution from other causes. I go further; the inefficacy of the terms of the agreement, as applied to bankruptcy, affords another proof, that the application was not designed. In the event of dissolution by misconduct, the parties were to name a valuer, and the property was to be divided. If the partnership was dissolved by the death of a partner, what was to be done? His executors or administrators were to name a valuer. The deed, then, contemplating bankruptcy and insolvency, the provision for insolvency is sufficient, because, while not yet become a bankrupt, the insolvent retains all capacities of acting. But if he becomes bankrupt, it is impossible to contend, that, under this clause, he is to name the persons who are to value the interests of his assignees; and no such authority is given to his assignees, for the word 'assigns' is not to be found in the deed. I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is, that the partnership was dissolved by bankruptcy; and the property must be divided, as in the ordinary event of dissolution, without special provision. The consequence is, that the assignees of the bankrupt partner are become, *quoad* his interest, tenants in common with the solvent partner; and the Court must then apply the principle on which it proceeds in all cases, where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the con-

of inquiry, which constantly arises in bankruptcy; and that is, what property, not strictly belonging to the bankrupt, but yet in his possession and reputed ownership at the time of his bankruptcy, will pass to his assignees, in opposition to the claims of the real owner? This inquiry is equally as applicable to cases of property owned by partners, as it is to property belonging to particular individuals. We have already seen,[1] in what cases partnership property, upon a dissolution of the partnership, may pass by transmutation or conversion thereof to one or more of the partners, or to the survivors or remaining members of the firm. But the point here proposed for consideration turns altogether upon the construction of a clause which was early introduced into the English Statutes of Bankruptcy, and has continued substantially in force down to the present day, throughout all the modifications which the system has successively undergone. It was provided by the statute of 21 James 1 (ch. 19, § 11), that, if any bankrupt, at the time of his bankruptcy, shall, by the consent and permission of the true owner or proprietary, have in his possession, order, or disposition, any goods or chattels, of which he shall be the reputed owner, and take upon him the sale, alteration, or disposition thereof, as owner, the commissioners shall have power to sell and dispose of the same, to and for the benefit of the creditors, as fully as any other part of the estate of the bankrupt.[2]

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cern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to good-will." See also the Reporter's note, 481, note (a); Ante, § 207, 208.

[1] Ante, § 358, 359, 372, 373, 396.

[2] 1 Cook's Bankr. Laws [60], 4th edit.; Watson on Partn. ch. 5, p. 272

§ 398. The provision thus made was doubtless designed more fully to enforce the doctrines of the common law, and to aid in the suppression of frauds, by preventing persons from giving an ostensible ownership of property to third persons, who might thereby acquire a false and collusive credit, to the gross injury of their creditors. To a limited extent, this remedial justice might have been ordinarily obtained, either at the common law, or through the interposition of equity.[1] But the statute has erected it into a positive rule, in order to prevent cavil, and to operate by way of preventive and admonitory justice.

§ 399. The general question, then, arises, When, and under what circumstances, the bankrupt can be properly said to have the possession, order, or disposition of any goods or chattels, or the reputed ownership thereof, with the consent of the true owner? It has been well observed,[2] that it is the principle of discountenancing fictitious credit, and its concomitant frauds, which the statute enforces. Indeed there can be no other just ground, upon which one man's debts are to be paid out of the property of another. In furtherance of this principle it has uniformly been held, that such a possession as is calculated to give a delusive credit is a reputed possession, within the meaning of the statute. When, therefore, the fact of reputed ownership is settled, the application of the statute is easy; for, from the reputed ownership, false credit arises;

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to 274, 2d edit. The statute of 6 Geo. 4, ch. 19, § 72, substantially reënacts the same provision.

[1] See 1 Story on Eq. Jur. § 388 to 394; 1 Fonbl. Eq. B. 1, ch. 3, § 4; Com. Dig. *Chancery*, 4, I. 3; Id. 4 W. 26; Storrs *v.* Barber, 6 Johns. Ch. R. 166, 169, 172; Pichard *v.* Sears, 6 Adol. & Ellis, R. 474.

[2] Gow on Partn. ch. 5, § 3, p. 272, 3d edit.

from that false credit arises the mischief; and to that mischief the remedy of the statute applies. But to make the statute available to the creditors of the party in whose visible possession the property has been, that possession must continue up to the time of the bankruptcy; for, if withdrawn, *bonâ fide*, by the owner, at any time, however short, before the bankruptcy, the property cannot be reclaimed by the assignees.[1] But a removal made in contemplation of bankruptcy being fraudulent, will not alter the possession in the consideration of law.[2] And, to constitute a fraud on the part of the true owner, it is necessary that the property should be left in the order and disposition of the bankrupt, with his consent. Where this is not the case, it would rather be to encourage than to check fraud, if what had been surreptitiously detained were to be divested from the innocent owner, and transferred to the assignees of the bankrupt.[3]

§ 400. In general, it may be stated, that the mere fact, that the partnership property, after the dissolution of the partnership, remains in the possession of one partner, who afterwards becomes bankrupt, will not be sufficient, of itself, to make him, in the sense of the statute, the reputed owner thereof; for this is certainly in consonance with the rights of all the partners, as all and each of them are equally entitled to the possession and custody thereof. The case must go further, and establish that the other partners have, by their own acts, or contracts, or conduct, conferred upon him the

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[1] Jones *v.* Dwyer, 15 East, R. 21; Ex parte Smith, 3 Madd. R. 63; s. c. Buck, R. 149; Storer *v.* Hunter, 3 B. & C. 368.

[2] Ex parte Smith, 3 Madd. R. 63.

[3] Ex parte Richardson, Buck, R. 488; Gow on Partn. ch. 5, § 3, p. 272,

exclusive right, and order, and disposition thereof, beyond the purposes belonging to the partnership. This results from the doctrine already stated, that all the other partners, upon the bankruptcy of any one of them, retain all their original rights and interests in the partnership effects.[1]

§ 401. In cases of partnership, where the transfer of the joint property from the retiring partners to the continuing partners is not made a matter of contract, it may be difficult to establish an actual consent to any change in the right to the property as taking place. But, although no actual consent can be proved; yet for this purpose the acts and conduct of the parties will warrant the presumption of an assent; and this will be inferred, if, from the time of the dissolution down to the time of the bankruptcy, the retiring partners renounce their equity of having the partnership credits applied in discharge of the partnership debts, and allow the continuing partners to deal as they think fit with the property, and to act with the world respecting it so as thereby to gain for themselves a false and delusive credit.[2] A dissolution on the eve of the retirement of a partner will not, of itself, convert into separate property the joint estate left in the possession of the partners continuing the business; for such a possession is qualified, and is clothed with a trust to apply the property in discharge of the joint debts,[3] unless, indeed, the laches of the retiring partner has been such as to suffer the joint property to remain in the exclusive possession

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[1] Gow on Partn. ch. 5, § 3, p. 267 to 269, 3d edit.; Id. p. 271 to 278; Id. p. 299 to 305; Holderness *v.* Shackford, 8 Barn. & Cresw. 612.

[2] See West *v.* Skip, 1 Ves. sen. 242; Ex parte Ruffin, 6 Ves. 129.

[3] Per Lord Eldon, Ex parte Williams, 11 Ves. 6.

of the continuing partners for such a length of time as falsely to give them an appearance of substance.[1] *A fortiori*, the statute will not apply to a case where the joint property is wrongfully withheld by one partner, against whom a bill in equity is filed for an account, and an injunction to restrain him from disposing of it, pending which he becomes a bankrupt.[2] But if a new firm be constituted of some of the members of an old firm, either with or without the addition of others, and the whole of the stock in trade of the old firm be delivered over to the new firm, and they be allowed to appear to the world as apparent owners of it, and afterwards become bankrupts; in such a case all the effects of the old partnership, found in specie amongst the property seized under the commission, will vest absolutely in the assignees; and though there be outstanding debts of the former firm unsatisfied, these effects, so found in specie, will not be considered as the joint estate of the former firm, either for the benefit of the joint creditors, or of the partners who have withdrawn from the firm.[3]

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[1] Gow on Partn. ch. 5, § 3, p. 272, 273, 3d edit.; West *v.* Skip, 1 Ves. sen. 242.

[2] Gow on Partn. ch. 5, § 3, p. 273, 3d edit.; West *v.* Skip, 1 Ves. sen. 242.

[3] Ex parte Ruffin, 6 Ves. 129, and Ex parte Williams, 11 Ves. 3, 6; Ex parte Fell, 10 Ves. 347; Gow on Partn. ch. 5, § 3, p. 272, 273, 3d edit.—I have in this and the two following sections generally followed the language of Mr. Gow, and he has illustrated the doctrine here stated by the following cases: "Therefore, where upon the dissolution of a partnership between a father and his son, it was agreed that, until the son was provided for, the father should allow him a third of the profits; and the father afterwards formed a partnership with a third person, and carried into it the stock belonging to the former partnership; on a commission of bankruptcy being awarded against the father and son it was held, that their joint property,

§ 402.* In cases of conditional transfers of the joint estate by some to the other partners, if the condition is not performed before the bankruptcy, the nature of the property is not changed by the simple force of the contract. But in such cases, and in cases in which the consideration for the transfer is not paid, the property will still pass, as separate estate under the statute, if from the time of the contract down to the date of the bankruptcy, the partners to whom it is assigned are permitted by the others to continue in the sole possession, and to carry on trade and acquire credit as sole owners thereof. There can, indeed, under such circumstances, be no solid distinction between a permitted possession under a contract, incomplete as regards the persons con-

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having been permitted by the son to become the visible property of the new partnership, it must, in the first instance, be applied in satisfying the creditors of that partnership; and that if afterwards any surplus remained, the share of the father in it would be his own separate property, and, therefore, subject to the claims of his separate creditors. And again, on the dissolution of a partnership between A., B., and C., three persons, as distillers, one of them (to whom the property in fact belonged) leased to C. and to one J. the distil-house and premises, and the several stills, vats, and utensils of trade specified in a schedule, as used by the former partnership; and C. and J. were to carry on the business on the premises, which they accordingly did for some time, but afterwards became bankrupts; whereupon a question was raised, whether such stills, vats, and utensils, so continuing in the possession of C. and J., and used by them in their trade, in the same manner as by the former partners, passed under the statute to the assignees, as being in the possession, order, and disposition of the bankrupts at the time of their bankruptcy, as reputed owners; and it was held that the stills, which were fixed to the freehold, did not pass to the assignees under the word goods and chattels in the statute; but that the vats, &c., which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners. So if a country partnership, consisting of three partners, sell their goods in London, in the names of two of the firm, the property in London will, it seems, be in the order and disposition of the two." Ibid.

tracting, and one which is tolerated by the parties independently of contract. The one must be as productive of the mischief contemplated by the statute, as the other; and both ought, therefore, to be held to be within its provisions. It has consequently been considered, that an exclusive possession, derived under a contract, which, as between the parties themselves, has not been performed, is sufficient to operate a conversion of the property, if the meaning of the transaction was to transmute it, and possession follows accordingly.[1]

§ 403. With respect to the description of property affected by the statute, it is settled that no distinction exists between debts due to the partnership and other property; for, notwithstanding debts are not assignable at law, yet they are still within the scope of the statute.[2] And where, upon the dissolution of a partnership, debts have been assigned by some of the partners to the others, although by the assignment the latter be-

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[1] Gow on Partn. ch. 5, § 3, p. 274, 275, 3d edit.; Ex parte Fell, 10 Ves. 348; Ex parte Williams, 11 Ves. 3, 6. — In Ex parte Rowlandson (1 Rose, 416, 419), Lord Eldon said: "If one partner puts another into the sole possession of the partnership estate and effects, and leaves them in his sole order and disposition, giving him title under an instrument upon the face of it giving title, it would be difficult to insist that he would have a lien upon that property for the consideration money, against the separate creditors of the other; considering, that he had by title, and by his own act, left this property in the sole order and disposition of the other. Previous to the dissolution, the joint creditors had established no lien on this property. They could only sue and take out execution, either jointly or separately, against the joint effects or separate effects of their debtors. Till they had actually matured their process into an execution, they had no means of specifically attaching the partnership effects, and could only work out their equity through the partner himself."

[2] Ex parte Ruffin, 6 Ves. 128; Ex parte Williams, 11 Ves. 6; Hornblower v. Proud, 2 Barn. & A. 329; Ex parte Enderby, 2 Barn. & Cresw. 389.

come the true owners of them; yet they will remain in the order and disposition of the partnership, and form part of the joint estate, unless, prior to the bankruptcy, notice of the assignment has been given to the debtors.[1] It is true, that a partner stands in a different situation from a stranger, to whom the debts might have been assigned; because in his character of partner, and independently of any assignment, he is personally competent to receive and discharge them. But it is also true, that, until notice be given to the debtors, the other partners are equally competent to receive and give acquittances for whatever may be due.[2] Besides, the partners, who receive the assignment without informing the debtors of the transaction, would thereby enable the others, if they were so disposed, fraudulently to obtain a fictitious credit with the debtors; and, therefore, so long as notice is withheld from them, the order and disposition of these debts must remain in the partnership. Upon this principle it has been held, that debts due to a partnership, which, upon a dissolution, are assigned by a retiring partner to the continuing partners,[3] or debts, which, by agreement, are, on a dissolution, to belong to one of the partners,[4] continue in the order and disposition of the partnership, and consequently form part of the joint estate, unless, previously to their bankruptcy, the debtors are apprized by the assignment or agreement. And it is insufficient in such cases to notify the dissolution only; for, unless express notice

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[1] Ryal *v.* Rowles, 1 Ves. sen. 349; s. c. 1 Atk. 165; Jones *v.* Gibbons, 9 Ves. 407; Ex parte Monro, Buck, R. 300.

[2] Duff *v.* East India Company, 15 Ves. 213.

[3] Ex parte Burton, 1 Glyn & Jam. 207.

[4] Ex parte Usborne, 1 Glyn & Jam. 358.

of the assignment be also given, the order and disposition will not be altered.[1] But the operation of the statute, and any question respecting the transmutation of the property, may, in all cases, be avoided, upon the retirement of a partner, by his assigning to the remaining partners all the effects in trust to pay the debts; because, then, notwithstanding there may not be a subsisting joint possession, the property would continue subject to the joint demands, and would not, by the simple fact of possession, be converted into separate estate.[2]

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[1] Ex parte Harris, 1 Madd. 587. — In Ex parte Usborne (1 Glyn & Jam. 358), a notice, stating the dissolution of the partnership by mutual agreement, and that all debts due to or from the concern would be received and paid by one of the partners, was inserted in the gazette. But Sir John Leach held such a notice ineffectual, and that the order and disposition of the debts owing by those debtors, who had not express notice of the agreement, remained in the partnership.

[2] Ex parte Fell, 10 Ves. 347; and see Ex parte Williams, 11 Ves. 6; Ex parte Martin, 19 Ves. 491; s. c. 2 Rose, 331; Gow on Partn. ch. 5, § 3, p. 275, 276, 277, 3d edit. — The Ship Registry Acts have not affected this question of reputed ownership at all, as those statutes relate to transfers by the acts of the parties, and not to transfers by operation of law. Mr. Gow on this subject says: "The statute of James is not repealed, and of course those sections of the late general bankrupt act, in which the provisions in the statute of James have been embodied, are not rendered inoperative as to shipping, by the Ship Register Acts; for these statutes relate to transfers made by the act of the party only, viz. from a former owner to a new owner, and where the transfer is capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do, or titles passing to executors or administrators in case of death. In these cases a title may be transmitted without any of the forms required by the statutes; and as a title may be transmitted without these forms in the case of bankruptcy generally, it may be so done in a case falling within the scope and object of the statute of James. Therefore, where A., the owner of a ship, duly assigned his interest in it to B., and B. became the registered

§ 404. Another question, however, still remains to be considered under this head; and that is, how the statute, as to reputed ownership, affects dormant partners. After some fluctuation of judicial opinion, the doctrine is now finally settled that, in cases of dormant partners, if the ostensible partners become bankrupt, the whole partnership property is to be deemed to be in their reputed ownership, and the dormant partner is excluded from any right or title thereto, as against the assignees in bankruptcy.[1]

§ 405. Hitherto we have been principally examining questions arising upon a dissolution by bankruptcy, so far as it affects the rights of creditors, either generally or in case of reputed ownership of property. Let us now look to some of the rights of the partners *inter sese*, consequent upon such a dissolution. And here it may be remarked that, generally, the partners are not entitled, in any case, to come in competition with the joint creditors upon the partnership funds, whatever may be the rights and equities which would otherwise attach between them against the bankrupt partner or partners.[2] So, where all the partners become bank-

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owner; but by his permission, A. continued to have the same in his possession, order, and disposition, until he became bankrupt, it was holden, that A.'s assignees were entitled to the ship. And under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, form part of the joint estate. On the same principle, a ship registered in the name of two partners, but which is left in the order and disposition of one of them, will pass to the assignees of the latter on his bankruptcy." See also Gow on Partn. ch. 5, § 3, p. 279; Kirkley *v.* Hodgson, 1 Barn. & Cresw. 558.

[1] Gow on Partn. ch. 5, § 3, p. 278, 279, 280, 3d edit.; Id. p. 300, 301; Kirkley *v.* Hodgson, 1 Barn. & Cresw. 588; Ex parte Enderby, 2 Barn. & Cresw. 389; In re Todd, 1 De Gex, R. 134.

[2] Gow on Partn. ch. 5, § 3, p. 293, 3d edit.; Id. p. 321; Collyer on Partn. B. 4, ch. 2, § 9, p. 655 to 658, 2d edit.; Ante, § 390 to 393; Ex

rupt, the general rule is, that the separate estate of one partner shall not claim against the joint estate of the partnership, in competition with the joint creditors; nor the joint estate against the separate estate, in competition with the separate creditors. And the creditors are not, in either case, considered as satisfied, until they have received the interest due upon their debts respectively, as well as the principal.[1]

§ 406. In like manner a solvent partner cannot prove his own separate debt against the separate estate of the bankrupt partner, so as to come in competition with the joint creditors of the partnership; for he is himself liable to all the joint creditors; and therefore he ought not, in equity, to be permitted to take any of the funds of the bankrupt before all the creditors, to whom he is liable, are duly paid.[2] Neither

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parte Kendall, 17 Ves. 521; Ex parte Adams, 1 Rose, R. 305; Ex parte Reeve, 9 Ves. 588. In Ex parte St. Barbe (11 Ves. 413, 414), Lord Eldon said: "There have been cases of a trade carried on by three, and distinct trades by two, and by one of them; where this sort of proof of a debt, distinctly due from one partnership to the other, has been permitted as between the partners, so engaged in different concerns. The course of the authorities has been, that a joint trade may prove against a separate trade; but not a partner against a partner. In the case of Shakeshaft, Stirrup, and Salisbury, Lord Thurlow went upon this distinction; that where there is only one partnership arranging different concerns, belonging to them all, in different ways, for the benefit of different parts of that joint concern, as in that instance, the three partners carrying on the business of cotton manufacturers in Lancashire, and two of them in London, there could not be proof by the three against the two. But if the trades are perfectly distinct, then the three, as cotton manufacturers in Lancashire, might be creditors upon the separate concern of the two, as ironmongers in London. I am inclined to abide by that case and Ex parte Johns."

[1] Collyer on Partn. B. 4, ch. 2, § 10, p. 666 to 678, 2d edit.; Ante, § 390 to 393.

[2] Collyer on Partn. B. 4, ch. 2, § 9, p. 655, 2d edit.; Ex parte Reeve, 9 Ves. 588, 589.

can a solvent partner prove against the separate estate of the bankrupt partner, in competition with the separate creditors of the bankrupt, unless and until all the joint creditors of the partnership are paid, or at least unless and until the joint estate is fully indemnified therefor; for if a dividend were reserved to him on such proof, the joint creditors might be injured by such solvent partner stopping, *in transitu*, the surplus of the separate estate, which would otherwise be carried over to the joint estate; or the separate creditors might be injured by their funds being stopped prospectively, upon the faith of such partner being afterwards able to pay the joint debts.[1]

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[1] Collyer on Partn. B. 4, ch. 2, § 9, p. 655 to 658, 2d edit.; Id. p. 660, 661, 662, 665.—In Ex parte Reeve (9 Ves. 588, 589), Lord Eldon said: "All these cases were very fully discussed by Lord Thurlow, in the case of Lodge and Fendall. Dr. Fendall was a creditor of the partnership of himself and Lodge, for large sums advanced. They became bankrupts immediately after the formation of the partnership; and those advances formed the joint estate to be divided. There was a struggle by Fendall to be admitted a creditor for the amount of his advances, as against the partnership. Lord Thurlow, after full consideration, was of opinion that all the authorities establish this: that those who, being in partnership, are themselves, or some of them, debtors to the creditors of every class, cannot come in competition with the creditors. After their demands are liquidated finally, the partners may be creditors upon each other; but not before. The course in bankruptcy has been, to stop the proof at the date of the commission, which is founded upon this; that the debt to be proved is the debt due before the commission, taking the commission to follow rapidly upon the act of bankruptcy; which, however, is frequently not the case. It is true, now, a great deal of debt accrued after the bankruptcy is paid under it; for instance, all interest accrued, though after the date of the commission, if the state of the effects allows it, upon a sort of equitable principle, the interest being considered as a kind of adjunct or shadow of the principal debt, which was due before the bankruptcy. It is now, therefore, clearly settled, that where there is a partnership and separate debts also, the partnership shall not be admitted a creditor upon any individual, or any individual upon the partnership, until the creditors of the individual and the creditors of the partnership are satisfied to the extent of 20*s*. in the pound, out of the respective estates; also,

§ 407. Subject, however, to these exceptions in favor of the joint creditors and separate creditors, and also to

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that where the separate creditors are paid 20*s*. in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors; but shall go to make the joint creditors equal with them as to the principal. No decision, however, has gone this length; that, if both the joint and the separate creditors are paid to the extent of 20*s*. in the pound, upon the payment to that amount to the creditors of each class, a partner shall not be admitted a creditor upon the partnership, or upon the individual. But I cannot distinguish the cases; for if the principle is, that neither the partnership nor the individual debtor shall claim in competition with the creditors, and if the creditors are entitled to any interest, the interest is as much a debt as the capital; and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until all their demand is satisfied; which includes both the principal and interest of their debts." See also Ex parte Moore, 2 Glyn & Jam. R. 166. Mr. Collyer on Partn. (p. 658, 659, 3d edit.) has on this subject added: "But the general rule in question, like all other general rules, is qualified in cases of necessity. Therefore, when the solvent partner, without his own default, is unable to procure a discharge from every joint creditor, — as, for instance, where one of the joint creditors is a lunatic, — in such case, it seems he will be permitted to prove against the separate estate, upon giving security for the debt which cannot be discharged, and paying the residue of the joint debts. Ex parte Young, 3 Ves. & Beam. 33. There are some cases, also, where, notwithstanding the retiring partner has not paid all the demands of the partnership, he has been permitted to prove against the joint estate, on the ground of the joint creditors having assented to the arrangements made between the retiring and remaining partners, or being barred by length of time from objecting to the retiring partner's proof. Thus, where a partnership had been dissolved upon the terms of the retiring partner taking a security from the remaining partner for the balance due to him, and the remaining partner was treated by the joint creditors as their sole debtor, until he afterwards became bankrupt; it was held that the retiring partner might prove his debt against the separate estate of the bankrupt, although some of the partnership debts were unpaid. Ex parte Grazebrook, 2 D. & C. 186. In this case it may be remarked, that the retiring partner had been a dormant partner. So, where upon the death of one of three partners, his executors carried on the trade with the surviving partners for a twelvemonth, and then dissolved the partnership, upon which occasion the two continuing partners gave the executors a bond, to secure the balance due to them, and more than six years afterwards the two became bankrupt; it was held that the executors had a right to prove the amount of the bond against the joint estate of the two continuing partners. Ex parte Hall, 3 Dea. 125. Again, where

that respecting reputed ownership, which has been previously mentioned, the solvent partners retain their full right, power, and authority, over the partnership property after bankruptcy, in the same manner and to the same extent as if no bankruptcy of a particular partner had occurred.[1] Their lien, also, remains in full force, not only to have the partnership funds applied to the discharge of the partnership debts and liabilities; but also to the discharge of all the debts due by the partnership to them, or any of them, as well as for their own distributive shares in the surplus. Hence they have a right to priority of payment of the debts due by the bankrupt to the partnership, in preference to his separate creditors; and if the joint funds should prove insufficient to discharge the debt, they have a right to insist upon coming upon the separate estate of the bankrupt therefor, *pari passu*, with the separate creditors.[2] In such a case the debt is deemed, in equity, a separate debt of the bankrupt, secured also by a lien on the joint fund.[3]

§ 408. In cases of this sort there is no difference,

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a person on the eve of bankruptcy induces another, by fraudulent means. to become his partner, and the latter advances capital to the concern, a case might be stated where the latter would be allowed to prove the amount of the capital so advanced, *pari passu* with the separate creditors of the bankrupt. However, such proof will not be allowed where the person defrauded has held himself out to the world as a partner, though only for a short time."

[1] Ante, § 341; Gow on Partn. ch. 5, § 3, p. 300 to p. 305, 3d edit.; Id. p. 321, 322, 323; Watson on Partn. ch. 5, p. 302, 2d edit.; Id. p. 314 to p. 324; Collyer on Partn. B. 4, ch. 2, § 9, p. 655, 2d edit.; Id. p. 661, 662.

[2] Gow on Partn. ch. 5, § 3, p. 321, 322, 323, 3d edit.; Ex parte Terrell, 1 Buck, R. 345; Collyer on Partn. B. 4, ch. 2, § 9, p. 655, 656, 2d edit.; Id. p. 661, 662; Fereday *v.* Wightwick, 1 Tamlyn, R. 850; Ex parte Reeve, 9 Ves. 588; Ex parte Drake, cited 1 Atk. 225; Taylor *v.* Fields, 4 Ves. R. 390; s. c. 15 Ves. 559, n.; Holderness *v.* Shackels, 8 Barn. & Cresw. 612.

[3] Many cases illustrative of this doctrine of the text will be found stated in Gow on Partn. ch. 5, § 3, p. 321 to p. 327, 3d edit.

whether the partnership is general or is only for a single adventure; or, indeed, whether the parties are strictly to be treated as partners or as part-owners, if in the particular adventure there is, either by contract, or by usage, or by custom, a lien of the co-adventurers upon the property engaged therein, and the produce thereof, for the proportion of the outfit and expenses incurred by one or more of them, for the common benefit.[1] In every such case, the lien of the other co-adventurers thereon will be deemed to include all such outfits and expenses, as well as their own shares in the adventure.[2] Hence, where the part-owners of a ship were engaged in the whale fishery, and the usual mode of managing the cargo in such cases was, that, on the arrival of the vessel at the homeward port, the whalebone was taken into the possession of the ship's husband, and sold by him, and the proceeds were applied towards the discharge of the expenses of the ship; and the blubber was deposited in a warehouse belonging to one of the owners, but rented by all the owners of the ship; and the oil produced from it was put into casks, each owner's share being weighed out, and placed separately in the warehouse, in casks, marked with his initials; and, after the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the owner's share of the disbursements had not been paid; and, in that case, the warehouseman was accustomed to detain the oil until the demand had been satisfied; it was held that the other co-adventurers had a lien, under such circumstances, upon all the undelivered oil

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[1] Gow on Partn. ch. 5, § 3, p. 303, 304, 3d edit.
[2] Ibid.

in the possession of the warehouseman, for the unpaid disbursements; that the assignees of the owner, who had become bankrupt, took the same oil subject to that lien, and that the lien was not divested by the separation of the share of the bankrupt, and placing it in the casks marked with his name.[1]

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[1] Holderness *v.* Shackels, 8 Barn. & Cressw. 612. Mr. Justice Bayley, in delivering his opinion in this case, fully expounded the general doctrine. "Where there is (said he) a joint adventure, which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively. In this case the joint adventurers obtained a quantity of oil in bulk. No partner, or representative of a partner, had a right to his aliquot part of that oil, until he has paid his share of the expense of procuring it. That will be the case, whether the shareholder has become a bankrupt or continues solvent. If he continues solvent, he may pay his share of the outfit and of the expense. If he does not pay it in money, the other part-owners have a right to see that an aliquot part of what has been gained in the adventure be retained, so as to pay that share of the outfit which he ought to pay. In this case Foxton became bankrupt, and having become bankrupt, if he could have paid in money his share of the outfit there would have been twenty-nine tons of oil coming to him. He could not pay; and, therefore, as it seems to me the justice and the law of the case is, that his share of the expense should be paid out of the twenty-nine tons, and that, until he has paid his share of the expense, he cannot claim that quantity. It has been said that there has, in this case, been a delivery, and that, in consequence of that delivery, the rights of Foxton and of his assignees are different from what they otherwise would have been. But it seems to me that there has not been a perfect delivery. It would have been perfect if the other part-owners had been dispossessed of the oil. That has not been done. The property still remained in the warehouse, and was the joint property of all. A part only has been removed. The removal of that part does not vary the right as to the residue. It is clear that the assignees cannot recover the twenty-nine tons before they pay Foxton's share of the expense. The other part-owners might say, there are twenty-nine tons allotted to you; you may take possession of all to which you will be entitled, but you must first pay your share of the expense; nine tons will be sufficient for that purpose; you may, therefore, take away twenty tons. The right of the other part-owners is not varied by their having allowed the bankrupt to take away twenty

§ 409. These seem to be the most material considerations, respecting the effects and consequences of the dissolution of a partnership by bankruptcy, which are important to be brought before the reader, in order to explain and illustrate the general distinction between the case of a dissolution by bankruptcy, and other cases of dissolution. A more minute inquiry into the various details of the system, would occupy a large space, altogether disproportionate to its relative usefulness in an elementary work of this nature, and serve to perplex and obscure what might, otherwise, be justly applicable to the systems of bankruptcy and insolvency in other countries, which differ in some particulars from that of England. And, here, these Commentaries, so far as they respect the subject of Partnership, might be concluded; for it is not within the scope thereof to examine at large the nature and extent of the remedies by or against partners, either at the common law, or in equity, whether they respect the government, or mere private

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tons. That being so, the plaintiffs are not entitled to recover. It has been urged that there has, in this case, been a change of possession, by reason of Locking's having debited the bankrupt in account, with a portion of the rent. But that portion of the rent must have been paid by the bankrupt before he took away the oil, in specie; or it might have been deducted out of his share of the produce, if he compelled the other shareholders to sell, in order to pay his share of the expense. The usage being for the part-owners to detain the oil, until each part-owner's share of the expense has been paid, it seems to me that the fact of debiting the party with warehouse rent can have no effect. I think, therefore, that the plaintiffs have not made out their right to the residue of the oil." The part-owners of the ship would be deemed partners in this adventure (although not in the ship itself), as sharing the net profits of the adventure, upon the grounds suggested in the preceding sections as to joint adventurers, and sharing the net profits. Ante, § 27, 34, 39, 40, 55. See also Mr. Baron Parke's Remarks in Pearson *v.* Skelton, 1 Tyrwh. & Grang. R. 848; s. c. 1 Mees. & Welsb. 504; Hawes *v.* Tillinghast, 1 Gray, 289.

individuals. Those topics properly belong to a Treatise of a very different character, where the principles of pleading, in its most general sense, are to be brought under review, and expounded with all their abstruse and intricate learning.

§ 410. The subject, however, of Partownership in goods and chattels, as contradistinguished from Partnership, has come incidentally under discussion in several parts of the present Commentaries;[1] and it has been commonly thought, from its close analogy to partnership, that a brief exposition of the general principles applicable thereto is peculiarly appropriate in such a connection. Pothier has, accordingly, thought it worthy to be separately discussed in an Appendix to his Treatise on Partnership. He considers every community of property, or, as we should call it, every tenancy in common of property, not a partnership, or affected by any repugnant convention, to be a kind of *quasi*-contract, or *quasi*-partnership; whether it be a universal community, or a community of particular things. And he illustrates the subject by examples, which, although perfectly accurate in the foreign and Roman law, where there may be a title by descent to every species of property, real as well as personal, are not so striking in our law; to wit, by cases of a community of property (*biens*) under a succession or descent to many heirs, and of legacies bequeathed jointly to many legatees.[2] He states the distinction between such a community of interest in property and partnership, as principally consisting in these circumstances, that partnership is founded

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[1] Ante, § 89, 90

[2] Pothier, De Societé, n. 2, 3; Id. App. n. 181 to 183; Ante, § 3, 4.

necessarily in the voluntary consent of the parties, and takes place by and under one and the same title; whereas, in other cases of mere community of interest, these ingredients are not essential. Certainly, they are not. But they may (as Pothier admits), nevertheless co-exist in the latter cases;[1] and, therefore, they do not seem to constitute, philosophically or logically, an appropriate distinction. Thus, for example, two persons may agree to purchase a ship together in equal moieties, and to hold the same as tenants in common; and they may take the ship at the same time by the same title deed.[2] The true distinction seems to be, that there is no community of interest in the entirety of the property in the latter cases; whereas, in partnership, there always is such a community of interest, founded upon the positive consent of the parties.[3]

§ 411. Following, therefore, the example of Pothier, as well as that of some of the most distinguished elementary writers on Partnership at the common law, who have in the like manner discussed in supplementary tracts the leading outlines of his branch of the law,[4] the present work will be concluded with a chapter devoted to the same purpose.

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1 Pothier, De Societé, n. 183.

2 Ante, § 3, 4.

3 Ante, 89, 90, 91; Gow on Partn. ch. 2, § 2, p. 32, 3d edit.

4 Collyer on Partn. B. 5, ch. 4, p. 793, 2d edit.; Watson on Partn. ch. 4, p. 227, 2d edit.; 2 Bell, Comm. B. 7, ch. 4, p. 655, &c., 5th edit.

CHAPTER XVI.

PART-OWNERS — RIGHTS, POWERS, AND LIABILITIES OF.

§ 412. We have already seen, that persons may become part-owners (or, as Pothier denominates them, *quasi* partners, *Quasi-Associes*),[1] of movable or personal property, as well as of real estate, without being partners.[2] As to part-ownership in real estate, not held as partnership property or assets, it does not properly fall within the scope of the present Commentaries; but it belongs rather to a Treatise, which is to unfold the general rights incident and appertaining to real property, in which the rights of persons holding real estate in joint-tenancy, in coparcenary, and in tenancy in common, are discussed and distinguished. A very succinct, but at the same time an accurate account of that subject, will be found in the elegant Commentaries of Sir William Blackstone.[3] What is proposed to be considered in the present chapter, will simply relate to part-ownership in movable or personal property.

§ 413. The general distinctions between joint-tenancy, tenancy in common, and partnership, have already been sufficiently pointed out in the preceding pages;[4] and, therefore, need not again be here adverted to. Movable or personal property may be held in joint-

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1 Pothier, de Societé, App. n. 184, 185, 186.
2 Ante, § 3; Id. § 89 to 94.
3 2 Black. Comm. p. 178 to 194.
4 Ante, § 89 to 91; Id. § 410.

tenancy, which, of course, gives the *jus accrescendi*, or right of survivorship, of the whole property to the survivor, unless the joint-tenancy is severed in the lifetime of the parties; or it may be held in tenancy in common, which gives to each tenant an undivided, but, at the same time, a distinct and independent interest therein, which does not pass to the survivor, but belongs to the personal representatives of the party upon his decease.[1] But there can, strictly speaking, be no estate in coparcenary of movable or personal property at the common law; because the latter title arises only by descent; and, at the common law, there can be no descent of such property.[2]

§ 414. In general, the rights, duties, obligations, authorities, and liabilities of part-owners are the same, in relation to every kind of personal property; and, therefore, whatever is affirmed in relation to one, will apply to all others, unless in cases where, from the peculiar nature and uses of a particular species of such property, or the peculiar customs and usages appertaining thereto, a different rule arises, by implication of law, to govern or affect it. Thus, for example, if two persons are tenants in common of a horse, or other personal chattel, each has an equal right to the possession and use thereof;[3] and each can sell only his own undivided share thereof.[4] If one tenant in common takes exclusive possession of a personal chattel, refusing to the other any possession or use thereof, the latter has

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[1] 2 Black. Comm. 399; Ante, § 89.

[2] 2 Black. Comm. p. 399.

[3] Co. Litt. 200, a; 3 Kent, Comm. Lect. 45, p. 153, 4th edit.

[4] Collyer on Partn. B. 5, ch. 4, § 4, p. 811, 2d edit.; Abbott on Shipp. B. 1, ch. 1, § 2, p. 3, 5th edit. 1829; 3 Kent, Comm. Lect. 45, p. 153, 154, 4th edit.

no remedy whatsoever by action; but he may take the chattel, if he can find it, from him who hath done him the wrong.[1] In relation to expenses, it may be stated that neither of such owners has a right to incur any expense thereon, which shall bind the other to contribution therefor, without some proof of an express or implied authority therefor, even when the expenses are absolutely indispensable for the due preservation thereof. This is unquestionably true at the common law, in the case of inanimate or dead chattels. But, probably, in the case of a tenancy in common of a horse, or other animal, in the absence of all controlling circumstances, a presumption would be sustained, that the necessary expenses of the keep thereof were to be borne by the mutual contributions of both, from the very nature of the chattel, and the mutual use and benefit intended to be derived therefrom by the tenants in common. However, if a positive or implied prohibition were shown, the same rule would prevail as in the ordinary cases of dead chattels.

§ 415. But the most useful as well as the most various illustrations of this subject, may be derived from a class of chattels constantly found engaged in commerce and navigation, that is to say, ships; the fitting out and the employment of which have given rise to many important questions; and, therefore, the doctrines applicable to ships seem especially to require a full exposition in this place. In our subsequent inquiries, the main topics discussed will be the rights, powers, duties, obligations, and liabilities belonging to part-owners of ships, as well *inter sese*, as in respect to third persons.

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[1] Co. Litt. § 323, p. 199 b, p. 200 a.

§ 416. Ships are strictly and technically denominated chattels, or personal property, at the common law, although they are distinguishable from most other kinds of personal property by the peculiar solemnities which belong to the mode in which the title thereto is ordinarily acquired, transferred, and made susceptible of pledge, lien, or mortgage. Ordinarily, it is well known that the title to personal goods and chattels will pass by mere delivery and change of possession. But it is not generally so in respect to the title to ships. In most, if not in all, commercial countries, the title thereto is now usually acquired, and transferred, and evidenced by written documents;[1] and statute enactments in those

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[1] Whether a delivery of a ship by parol, without any bill of sale or other written instrument of transfer, be sufficient to pass a good title to the ship, has been thought not quite settled in our law. It is true that a ship is a mere personal chattel, and personal chattels ordinarily may pass by delivery only, without any written evidence of contract or title. But the text shows that, from very early times, a different course has been pursued in respect to ships; and if the universal maritime usage has been to evidence a transfer of ships by written documents, that usage would seem, *primâ facie*, to form a part of our municipal law, — the law merchant being a part of the common law. There is a dictum in the case of Lamb v. Durant (12 Mass. R. 54), in which it is declared that ships may pass by delivery only, as well as any other chattel, so far as respects the property of the vessel. And a like expression fell from the Court in Taggard v. Loring, 16 Mass. R. 336. But in neither of these cases was the point directly before the Court. On the other hand, there is no case in the English Jurisprudence in which it has been decided that a transfer by parol is sufficient to pass the title. The point was made in Rolleston v. Hibbert (3 Term R. 406), by counsel; and Lord Kenyon then said: "It was first contended, that it was not necessary that the property in a ship should pass by a written instrument. On that point I give no opinion, because it is not necessary." This language shows that no such point was, at that time, deemed settled in the common law; otherwise it would at once have been recognized. Lord Stowell, on the other hand, in the case of The Sisters (5 Rob. R. 155), manifestly shows his own opinion to be, that a bill of sale is necessary. His words are too remarkable to be omitted. "It has been contended in argument (says he), that the effect of a bill of sale alone would not be material, because this was

countries create many regulations, respecting the mode of acquiring, and transferring, and evidencing that title, as well for municipal purposes and policy, as for the due ascertainment and proof of the national character of the ship, and its right to protection and privileges upon the ocean.[1]

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a foreign ship, in respect to which it might not be requisite that it should pass by a bill of sale. It is said that the agreements to be found in these letters (i. e. in that case), and the actual delivery under it, would be sufficient to establish the equitable title; and a reference has been made on this subject to some opinions at common law, which are said to have been given in favor of such a title. The opinions of gentlemen of that bar must undoubtedly be entitled to entire respect, on a question of municipal law. But this is a question of a more general nature, arising out of a system of more general law; out of the universal maritime law, which constitutes a part of the professional learning of this Court and its practisers. According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime Courts of all countries would look. It is the universal instrument of transfers of ships in the usage of all maritime countries; and, in no degree, a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects; what the Court of Admiralty would, in its ordinary practice, require; and what the legislature of this country has now made absolutely necessary, with regard to British subjects, by the regulations of the statute law." In Ex parte Halket (19 Ves. 474), Lord Chancellor Eldon said: "It is laid down that the ship may be bound by bill of sale, but it cannot be by parol." Mr. Jacobsen, in his Sea-Laws (B. 1, ch. 2, p. 17, 21), manifestly considers a bill of sale indispensable, by maritime usage, to pass the title. In the case of Ohl *v.* The Eagle Insurance Company, 4 Mason, R. 172; s. c. Id. 390, the question underwent considerable discussion. See also Atkinson *v.* Maling, 2 Term R. 462, 466; Sutton *v.* Back, 2 Taunt. R. 301, and particularly the argument of the defendant's counsel, p. 305; Abbott on Shipp. Pt. 1, ch. 1, § 5, p. 12; Zouch on Admiralty Jurisdiction, V. p. 103.

[1] Abbott on Shipp. Pt. 1, ch. 1, § 1, p. 1, 5th edit.; Id. ch. 2, § 1, p. 23; 1 Valin, Comm. Liv. 1, tit. 14, art. 1, p. 340, 341; Id. Liv. 2, tit. 10, art. 1, p. 601, 602. — The present British Ship Registry Act of 3 and 4 William 4, ch. 55, will be found at large in the Appendix to Mr. Sergeant Shee's very valuable edition of Lord Tenterden's Treatise on Shipping; and the nature and objects and construction of the various clauses of the old Act will be found in Lord Tenterden's Text, Pt. 1, ch. 2, p. 47 to 83, London edit. 1840. The American Ship Registry Acts will be found in the Appendix to the American edition of Abbott on Shipping (1829); and the nature, objects,

§ 417. Property in a ship may be acquired by two or more persons, either by building it at their own expense, or by the purchase of a part thereof of the sole owner, or by a joint purchase of the whole of another person.[1] But, whether acquired by the joint building, or by a part purchase, or by a joint purchase, the parties, in the absence of all positive stipulations to the contrary, become entitled thereto, as tenants in common and not as joint-tenants.[2] In this respect, it will make no difference, whether the title is acquired at one and the same time, by and under one and the same instrument, or whether it is acquired at different times, and under different instruments.[3] This is a natural, if not a necessary result of the doctrine, that the *jus accrescendi* has no existence among merchants, or in the business of commerce and navigation. A different doctrine, which should introduce into the maritime law the nar-

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and construction of the various clauses thereof, in the notes to chapter second of the text to that edition, from p. 23 to 68. See also 3 Kent, Comm. Lect. 45, p. 139 to 150, 4th edit. One of the most prominent differences between the British and the American system is, or at least was, that, by the former, no title could be acquired or transferred except in the manner prescribed by the Registry Act; but, in the latter, the transfer may be good and valid in law, although the requisites of the Registry Act are not complied with. But then, by such non-compliance, the ship will lose her American character and privileges as a registered ship. It is not within the design of these Commentaries to go into any details on this subject. They will properly find a place in a work on the Law of Shipping and Navigation.

[1] Abbott on Shipp. Pt. 1, ch. 1, p. 1, § 1, 5th edit.; Jacobsen's Sea-Laws, by Frick, ch. 3, p. 36, 37, edit. 1818.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 1, p. 68, 5th edit.; Id. § 9, p. 79, 5th Amer. edit. 1829, note (1); Abbott on Shipp. by Shee, Pt. 1, ch. 3, § 5, p. 96, 6th edit. 1840; Macy v. DeWolf, 3 Wood. & Min. 193.

[3] Collyer on Partn. B. 5, ch. 4, p. 793, 2d edit.; Doddington v. Hallet, 1 Ves. 497; 3 Kent, Comm. Lect. 45, p. 151, 4th edit.; Nicoll v. Mumford, 4 Johns. Ch. R. 522; Watson on Partn. ch. 1, p. 54; Id. ch. 2, p. 67; Id. 91; Ex parte Young, 2 Ves. & Beam. 242, 243. Jacobsen's Sea-Laws, by Frick, ch. 3, p. 36, 37, edit. 1818.

row doctrine of the common law, as to joint-tenancy and the right of survivorship, would be fatal to the interests of commerce, and overthrow the plain dictates of public policy. The whole course of commercial usage and opinion has settled the doctrine the other way; and, accordingly, upon the death of one of the part-owners, his executors and administrators become tenants in common of the ship, with the survivors.[1] Of

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[1] Abbott on Shipp. Pt. 1, ch. 1, § 1, p. 1; Id. ch. 3, § 1; Nicoll *v.* Mumford, 4 Johns. Ch. R. 522; s. c. 20 Johns. R. 611; Dunham *v.* Jarvis, 8 Barbour, 94. — In the 5th London edition of Abbott on Shipping, Pt. 1, ch. 3, § 1, the following note (a) occurs. "This is the most usual practice. If the interests are not severed and distinguished in this way, but the entire ship is granted to a number of persons generally, it is apprehended they become joint-tenants at law, and that the rule *Jus accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in a Court of Equity." To which the American Editor (1829) has subjoined the following comment. "This is not a note of the original author, but of his English editor. The point stated in it seems new, and is apparently contrary to what is laid down in Watson on Partnership, where he seems to consider the rule, as to the *jus accrescendi*, not applicable either to partnerships generally, or to ownership of vessels in shares, but as an exception created by the law merchant, and necessary for the advancement of commerce. In chapter 1, p. 54, he says: 'If several either build or purchase a ship, they are part-owners or partners as to this concern.' And again, in chapter 2, p. 67: 'There is no difference in the interest of partners in goods to be disposed of in the course of trade, and in a chattel, the keeping and employment of which constitute the object of the partnership. The part-owners of a ship are tenants in common with each other of their respective interests.' He afterwards says, in chapter 2, p. 91, that a part-owner of a ship can only dispose of his own share, and not of that of his co-owners, even if it be partnership property. The case of The King *v.* Collector of the Customs (2 M. & Selw. 223), proceeds on the principle, that the same rule, as to non-survivorship, exists as to property in ships, as in common partnership property. No allusion was there made as to the necessity of a suit in equity by the representative of the deceased in any case; and the particular shares of each party in the ship are not stated or referred to as material facts. In America it has not been unusual to omit any specification of the shares of each part-owner, both in the register and bill of sale; and it has never been yet decided, that such an omission made the parties joint-tenants with benefit of survivorship. Mr. Collyer entertains the like opinion with the American editor. Collyer

course, the general rule of law, as to the rights of tenants in common, prevails in regard to ships, that each part-owner can sell only his own share thereof;[1] whereas, in cases of partnership (although not in cases of joint-tenancy), any one partner can sell the entirety of the ship.[2]

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on Partn. B. 5, ch. 4, p. 793, 2d edit. It may be added that this is now the general understanding of the doctrine in America. 3 Kent, Comm. Lect. 43, p. 40, 4th edit.; Id. Lect. 45, p. 151. In Ohl v. Eagle Ins. Co., 4 Mason, R. 172, 309, the Court thought that if no other distinct shares appeared in the register or bill of sale, the parties must, in the absence of all other proof, be presumed to hold in equal moieties. See also, In the matter of Blanshard, 2 Barn. & Cresw. 244; Ex parte Young, 2 Ves. & Beam. R. 242; Nicoll v. Mumford, 4 Johns. Ch. R. 522; s. c. 20 Johns. R. 611 and 615, note."

[1] Hopkins v. Forsyth, 2 Harris, 34. Case of a steamboat.

[2] Abbott on Shipp. Pt. 1, ch. 1, § 2, p. 3, 5th edit.; Ante, § 89, 90, 91; 2 Bell, Comm. B. 7, ch. 4, p. 655, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 4 p. 811, 2d edit.; Jacobsen's Sea Laws, by Frick, ch. 3, p. 36, 37, edit. 1818. — Mr. Chancellor Kent (3 Kent, Comm. Lect. 154, p. 54, 4th edit.) has well stated the distinction between part-ownership in ships and partnership in ships. He says: "The cases recognize the clear and settled distinction between part-owners and partners. Part-ownership is but a tenancy in common, and a person who has only a part interest in a ship, is generally a part-owner, and not a joint-tenant or partner. As part-owner he has only a disposing power over his own interest in the ship, and he can convey no greater title. But there may be a partnership, as well as a co-tenancy, in a vessel; and, in that case, one part-owner, in the character of partner, may sell the whole vessel; and he has such an implied authority over the whole partnership effects, as we have already seen. The vendee in a case free from fraud, will have an indefeasible title to the whole ship. When a person is to be considered as a part-owner, or as a partner, in a ship, depends upon circumstances. The former is the general relation between ship-owners, and the latter the exception, and requires to be especially shown. But as the law presumes, that the common possessors of a valuable chattel will and desire whatever is necessary to the preservation and profitable employment of the common property, part-owners, on the spot, have an implied authority from the absent part-owners, to order for the common concern whatever is necessary for the preservation and proper employment of the ship. They are analogous to partners, and liable as such for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of part-owners."

§ 418. It is obvious, that a personal chattel, vested in several distinct proprietors, cannot be advantageously possessed or enjoyed, unless by common consent and agreement among them all.[1] For, as each has an equal title to the possession and use thereof, no one can oust the others of that possession or use; and, when once a struggle or controversy exists among them for the accomplishment of purposes adverse to each other, the mischief must be immediate to the interest of some, and perhaps ultimately ruinous to that of all. This remark applies with peculiar force to ships, which (as has been quaintly, but truly said) were "originally invented for use and profit, not for pleasure or delight; to plough the sea, not to lie by the walls."[2] Hence, while the possession, use, and employment of other personal chattels have been generally left to the free and unrestricted discretion of the proprietors thereof, and their own sense of the necessity of mutual coöperation and forbearance for their mutual benefit, it has been the policy of maritime nations, from a very early period, to provide regulations respecting the joint ownership of ships in order to prevent the obstinacy of one or more proprietors from interfering with the just rights and interests of the rest, as well as to promote the general advancement of commerce and navigation, and to add to the resources of national wealth and national power. Hence in cases of ships, almost all maritime nations, in modern times, have provided regulations, by which some of the part-owners of the ship shall be at liberty, notwithstanding the dissent of others, to employ it in trade and navigation, for

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1 Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 68, 5th edit.

2 Molloy, B. 2, ch. 1, § 2; Godolphin, Adm. Jurisd. Introd. p. 13; The Apollo, 1 Hagg. Adm. R. 306, 312; 3 Kent, Comm. Lect. 45, p. 151, 152, 4th edit.

their own profit, and at their own expense and risk. Of course, if all are agreed, and all consent, the employment and the expenses and the profits are to be on the joint account and for the joint benefit. In such cases, it is not unusual for all the owners, by common consent, or a fixed agreement among themselves, to appoint an agent (who may be either a part-owner, or a stranger) to superintend the management and concerns of the ship, who (as has been justly said), by a very intelligible figure of speech, is called the ship's husband, and who directs the repairs, appoints the officers and mariners, and generally conducts all the affairs and arrangements for the due employment of the ship in commerce and navigation.[1]

§ 419. It follows, of course, that wherever the ship is reasonably repaired, or necessary expenses are incurred, by the consent of all the owners, for the common benefit, each part-owner is bound to contribute his share

[1] Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 68, 5th edit.; Card v. Hope, 2 Barn. & Cresw. 661; Collyer on Partn. B. 5, ch. 4, § 4, p. 810, 2d edit.; 3 Kent, Comm. Lect. 45, p. 151, 156, 4th edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 2, p. 503, 504, 5th edit.; Jacobsen's Sea Laws, by Frick, ch. 3, p. 38, 39, edit. 1818.—Mr. Collyer on this subject says: "In order to administer the affairs of the ship with unanimity, it is usual to appoint a ship's husband. He may be either a part-owner or a stranger, and may be appointed by writing or parol. His duties are to see to the proper outfit of the vessel; to have a proper master, mate, and crew; to see to the furnishing of provisions and stores; to see to the regularity of all the clearances from the customhouse; to settle the contracts; to enter into proper charter-parties, or engage the vessel for general freight; to settle for freight, and adjust averages with the merchant; to preserve proper certificates and documents in case of future disputes with insurers or freighters, and to keep regular books of the ship. But without special powers, he cannot borrow money generally for the use of the ship, though he may settle accounts and grant bills for them, which will form debts against the concern. Nor can he, without special authority, insure the ship." See also 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 2, p. 503, 504, 5th edit.; Sims v. Britain, 4 Barn. & Adol. 375; 3 Kent, Comm. Lect. 45, p. 157, 4th edit.

thereof; and, if the whole has been paid by one part-owner, he has a right at law to recover their several contributory shares from each of the others.[1] Now, in this respect, the case differs from one of a mere partnership in a ship; for in the latter case (as we have seen),[2] no partner has any right of contribution against the others for any sums paid, or expenses incurred on the joint account, until all the partnership concerns are adjusted; and, then, only in equity.[3] There is, on the other hand, in some respects, a coincidence between the cases; for in each of them all the parties are at the common law jointly liable, *in solido*, for the whole debt to third persons, who have credited them for the repairs, or other expenditures, for the common benefit.[4]

§ 420. The French law agrees with ours, so far as it makes all the part-owners liable in the like manner as partners, to contribute their proportion of all the necessary debts and reasonable expenses, incurred for the common benefit. But, if one part-owner only has contracted with the creditor, the latter can have no recourse for the debt, except against the particular partner with whom he has contracted. However, upon payment of it, that party has his remedy over against the others for their contributory shares.[5] On the contrary, in cases of mere commercial partnerships, the French law makes each partner liable, *in solido*, to the creditor for the whole debt.[6] If, indeed, all the part-

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 13, 15, p. 82, 84, 5th edit.
[2] Ante, § 219, 220, 260.
[3] Ante, § 219, 220, 221, 260.
[4] 3 Kent, Comm. Lect. 45, p. 156, 4th edit.
[5] Pothier, de Societé, n. 187; Id. n. 185; Id. n. 86; Abbott on Shipp. Pt. 1, ch. 3, § 15, 5th edit.
[6] Pothier, de Societé, n. 96; Ante, § 102, 105, 108.

owners have jointly contracted with the creditor, each will be liable to him in severalty for his own share of the joint debt;[1] and for that only, unless they have all agreed to be bound *in solido*.[2] The law of Holland is, in this respect, coincident with the French law, making the several part-owners in all cases chargeable for the repairs and other expenses upon the ship, only according to their respective interest in the ship.[3] In all cases of this sort, however, we are to understand, that the expenses are incurred with the consent of all, or at least of a majority of the part-owners; for neither a single part-owner, nor a minority of the part-owners, have any right to make any such repairs, or incur any such expenses, against the will of the majority; the latter having (as we shall presently see), a complete authority to regulate the whole concerns of the ship.[4]

§ 421. Where, however, no common consent or agreement exists among the owners, as to the possession, use, enjoyment, or preservation of the ship, it becomes necessary to ascertain, what, at the common law, are the ordinary rights, duties, obligations, and liabilities of the part-owners, either *inter sese*, or in respect to third persons. And in the first place, as between the part-owners themselves. The inquiry, which is here first naturally presented, is, What are the rights, and duties, and liabilities of the part-owners of a ship to each other in respect to repairs and other expenditures, made by any of them for the proper or necessary preservation thereof? The general under-

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[1] Pothier, de Société, n. 186, 187.

[2] Pothier, de Société, n. 186, 187.

[3] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 84, 5th edit., who cites Vinnius in. Peckium, p. 155.

[4] Post, § 426, 427.

standing at the common law is, that, if there be no express or implied agreement between the owners, either by their conduct, or by their acts, sanctioning any such repairs or expenditures, although any one or more of the owners have a right to incur them; yet they have no remedy over against the others for contribution thereto; but they must themselves, whether they constitute a majority or minority of the owners, bear the whole charge.[1]

§ 422. The reason, usually given for this doctrine, is, that no one part-owner has a right to compel another, against his will, to incur any burden or expense, even although necessary for the preservation of the common property; but it should be left to his own free choice. For, otherwise, in case one part-owner were poor, it might operate as a grievous evil, and compel him to sell his share by a sort of forced sale.[2] Perhaps the doctrine may have been founded upon the analogy to cases of joint ownership of lands and woods, under the old common law, where no one owner was bound to contribute to the repairs of the fences and other meliorations made upon the common property, although for the common benefit, unless done with the common consent and agreement of all the owners, or justified by a special custom.[3] But there was an exception in cases of houses and mills, which being of a higher legal consideration, for the habitation of man, and for the general good of the realm, the common law required

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 69, 70, 71, 5th edit. 1829; 3 Kent, Comm. Lect. 45, p. 153, 154, 4th edit.; Macy *v.* De Wolf, 3 Wood. & Min. 193.

[2] Ibid.

[3] Lewis Bowle's Case, 11 Co. R. 82, b.; Co. Litt. 200, b.

all the owners to contribute towards the necessary repairs thereof.[1] There seems to be great good sense in this distinction; and certainly it is not less applicable to the case of ships, which are for the use and habitation of man, and the general good of the country, than it is to houses and mills. The Roman law positively affirms the like doctrine of contribution, in respect to reparations of houses held in common.[2] And, hence, some maritime writers in modern times have, as we shall presently see, applied it by analogy to the case of part-ownership of ships.[3]

§ 423. Whether, indeed, this supposed doctrine of the common law, as to ships, is founded upon satisfactory principles or not, may perhaps be thought to deserve more grave consideration than it seems hitherto to have received. If we look to the general policy of shipping and navigation, in all commercial nations, and the objects for which joint ownership in ships is allowed

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1 Fitzh. Nat. Brev. 127; Id. 162; Co. Litt. 200, b.—Lord Holt is reported in Tenant v. Goldwin (2 Lord Raym. 1089, 1093), to have said: "That the writ is grounded upon the custom of the place, and not upon the common law; and there is such a custom in many places, and there is no other authority for it." It is not a little remarkable, that neither Lord Coke, nor Fitzherbert, in affirming the doctrine, makes any allusion whatever to any such custom; but they put it as a doctrine of the common law; and put it upon the express ground, "that owners are in that case (as Lord Coke says) bound, *pro bono publico*, to maintain houses and mills, which are for the habitation and use of men." Mr. Chief Justice Parsons, in delivering the opinion of the Court in Carver v. Miller (4 Mass. R. 559, 561), states it to be a clear doctrine of the common law. The like doctrine was affirmed by Mr. Justice Jackson, in delivering the opinion of the Court, in Doane v. Badger, 12 Mass. R. 65, 70. But see Converse v. Ferre, 11 Mass. R. 325, 326.

2 Dig. Lib. 17, tit. 2, l. 52, § 10; Pothier, Pand. Lib. 17, tit. 2, n. 53; Domat, B. 3, tit. 1, § 5, art. 6, 7, 8.

3 Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 68, 69, 5th edit.; Post, § 424, note (3).

and encouraged, that is, to create a large and flourishing marine trade by the union of small capitalists, and thereby augmenting private wealth as well as national interests, we shall see at once why the ordinary rules with regard to joint ownership in other personal property have been made to yield in the case of ships, and have either been wholly set aside, or controlled by principles of a more equitable and liberal character. Now it is scarcely practicable to state a single reason, why the ordinary rules should have been relaxed in other cases, which is not strictly applicable to the case of repairs, necessary and proper for the due preservation of the ship. In a just and reasonable sense, all such repairs are for the common benefit of all the owners, in order to prevent the utter ruin and destruction of the common property; and they also generally enhance the value, as well as preserve the sound state of the property.

§ 424. It is clear (as has been already suggested),[1] that many of the maritime Jurists, as well as some of the positive codes of modern maritime nations, assert the doctrine that all the owners of a ship are bound to contribute according to their shares, for all expenses incurred in the necessary reparation thereof by any one of the owners; and this duty may be enforced by suit in case of their neglect or refusal. Straccha affirms this in positive terms, and in this he is followed by Roccus and other jurists.[2] It has also the sanction of the highest tribunals of Genoa, one of the most

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[1] Ante, § 422.

[2] Straccha, De Navibus, Pars 2, n. 8, p. 420, edit. 1669; Roccus, De Nav. n. 22; 2 Emerigon, Traité des Contrats a la Grosse, ch. 4, § 4, p. 427 to 429, edit. 1783.

enlightened commercial states in the early progress of commercial enterprise in the Mediterranean.[1] Nay, in some States and by some jurists the doctrine has been pressed further; so that if the negligent owner did not, after due notice, within a limited time, pay his proportion of the repairs with interest, he forfeited his title to his share in the ship; a severe and harsh regulation, which is scarcely consonant to the liberal spirit of maritime jurisprudence.[2]

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[1] Decis Rotæ Genuæ, Decis. 170, n. 3; Straccha, De Merc. p. 285, edit. 1669.

[2] Ibid.; Straccha de Navib. Pars 2, n. 8, p. 420, edit. 1669; Roccus, de Nav. n. 22; 2 Emerigon, Traité a la Grosse, ch. 4, § 4, Tom. 2, p. 427, edit. 1783. — Straccha, in the passage referred to, says: "Naves plerunque refectione egere, nemo est, qui nesciat; et innuit Jurisc. in l. fin. ff. de exer. Nec etiam longo tempore durant, licet novis tabulis reficiantur; ut scribit Ange. in l. foramen. ff. de ser. urb. præ. Unde proxime accedit ad propositas quæstiones illà dubitatio. Duos fingito exercitores, seu ejusdem navis dominos; alterum cessantem, et negligentem reficere; alterum vero navim, quæ vitium fecerat, communi nomine refecisse. Puto, si intra quatuor menses socius cessans nummos pro portione erogatos cum centesimis usuris, non restituerit consocio, qui refecerit, ex oratione Divi Marci reficienti jus dominii pro solido vendicare, vel obtinere decretum esse. L. si. fratres. § idem respondit. Vers. § idem respondit socius, qui cessantis. ff. pro socio. l. si. ut proponis. C. de ædifi. privat. Quæ jura singulariter notanda inquit Areti. (Inst. de act. § sequens. n. 13.) socium cessantem reficere rem communem. Si enim alter reficit, et cessans intra quatuor menses non restituit partem impensarum cum usuris, perdit dominum suæ partis, et reficienti acquiritur. Probat et commendat ibidem Jason. sub num. 48. et idem Jason. in repet. l. quominus. ff. de flum. n. 112, et in l. creditor. n. 7. ff. si cert. peta. Hoc idem placuit Veron. (in tract. de servi. urb. prædi. in tit. de refect. rub. 59. vers. quarto quæritur), subdens, id valde notandum esse. Et vide Mars. sing. 359. mille." The passage in the Digest (lib. 17, tit. 2, l. 52, § 10), is as follows: "Idem respondit: Socius, qui cessantis cessantiumve portiones insulæ restituerit, quamvis aut sortem cum certis usuris intra quatuor menses, postquam opus refectum erit, recipere potest, exigendoque privilegio utetur, aut deinceps propriam rem habebit. Potest tamen pro socio agere ad hoc, ut consequatur, quod sua intererat. Finge enim, malle eum magis suum consequi, quam dominium insulæ: Oratio enim D. Marci idcirco quatuor mensibus finit certas usuras, quia post quatuor diminium dedit."

§ 425. Above all, the Consolato del Mare has explicitly sanctioned the doctrine, and declared, that when the partowner-master (Patron, Senyor de Nau) finds that the ship needs repairs in the place of residence of the owners, if all of them, upon notice, consent to have them made, he may repair the ship at the expense of all, and hire money on the share of any delinquent part-owner who fails to discharge his portion. If the owners deem the repairs improper, because the ship is not worth repairing, then either the partowner-master or the other owners may compel a public sale of the ship. But if such master repairs the ship without the consent of the other part-owners, none of them will be liable to him for such repairs; but he must reimburse himself, as he may, out of the earnings of the ship.[1]

§ 426. Pothier has affirmed the general doctrine of the liability of every part-owner to contribution for all repairs, reasonably (*utilement*) made upon the common property, at least if he does not abandon his part of the property; and he applies it to ships.[2] He takes

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[1] Consolato del Mare, ch. 200 [245]; Id. ch. 194 [239]; Id. ch. 197, [242]. *I quote from* Pardessus's edition, Tom. 2, p. 237 to 240; Id. p. 223 to 227; Id. p. 231 to 233.

[2] Pothier, de Societé, App. n. 187; Id. n. 192; Id. n. 86. His language is (n. 187): "A l'égard des dettes contractées pour les affaires de la communauté durant la communauté, tel que seroit un marché fait avec des ouvriers pour des réparations à faire à quelque héritage commun, il n'y a que celui des quasi-associés, qui les a contractées, qui en soit tenu envers les créanciers, sauf à lui à s'en faire indemniser par ses quasi-associés, pour la part que chacun d'eux a dans la communauté, lorsqu'elles ont été utilement contractées. Lorsque ces quasi-associés les ont contractées ensemble, s'il n'y a pas une clause de solidité exprimée, chacun d'eux n'en est tenu envers le créancier que pour sa portion virile; de même que nous l'avons décidé, suprà, à l'égard des sociétés particulieres, qui ne sont pas sociétés de commerce; sauf à se faire raison entre eux de

the appropriate distinction in such cases, that the other part-owners are not liable to the mechanics who have made the repairs; but only to the part-owner who has procured them to be made.[1] And he founds himself upon the doctrine of the Pandects. *Si ædes communes sint, aut paries communis, et eum reficere, vel demolire, vel in eum immitere quid opus sit; communi dividendo judicio erit agendum, aut interdicto, uti possidelis, experimur.*[2] The same doctrine is maintained in the Institutes, as arising, *quasi ex contractu*, in all cases where one proprietor incurs expenses upon the common property, which are for the benefit of all. *Item, si inter aliquos communis res sit sinè societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo judicio, quod solus fructus ex eâ re perceperit, aut quod socius ejus solus in eam rem necessarias impensas fecerit; non intelligitur ex contractu pro-*

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ce, que chacun d'eux en doit porter de plus ou de moins que cette portion virile, eu égard à la part, qu'il a dans la communauté." Again he adds, (n. 192): "C'est encore une des obligations, que forme la communauté, que chacun des quasi-associés est obligé de contribuer pour la part, qu'il a dans la communauté, aux réparations, qui sont à faire aux choses communes, à moins qu'il ne voulut abandonner la part, qu'il a dans la chose." Emerigon thinks that the jurists who maintain the doctrine, that the share of a delinquent owner is forfeited by omitting, after notice, within the limited time, to pay his contributory portion, is founded upon a mistaken application of the Law of the Emperor Adrian (Cod. Lib. 8, tit. 10, l. 4), respecting repairs on houses, which he deems to be a mere local regulation for the improvement of Rome. 2 Emerig. des Assur. Traité des Contrats a la Grosse, ch. 4, § 4, p. 427, edit. 1783. But Emerigon insists, equally with Pothier, that the delinquent owner is liable to contribution; and that, upon his refusal, the other owners may borrow the money on bottomry on his share. 2 Emerig. Traité a la Grosse, ch. 4, § 4, p. 429, edit. 1783.

[1] Ibid.; Ante, 420.

[2] Dig. Lib. 10, tit. 3, l. 12; Pothier, Pand. Lib. 14, tit. 3, n. 67; Pothier de Societé, n. 86, 192.

priè obligatus esse; quippe nihil inter se contraxerunt; sed, quia ex maleficio non tenetur, quasi ex contractu teneri videtur.[1]

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[1] Inst. Lib. 3, tit. 28, § 3. See also Dig. Lib. 17, tit. 2, l. 52, § 10. It should be recollected that, in the Roman law, no such distinction generally prevailed between real estate and personal estate, as is recognized in the common law. Both might descend, and be divised in the same way, and both were generally affected by the same incidents. Vinnius, in commenting on the text says: "Tertia species, quæ quasi ex contractu obligationem producit, est communio rerum inter aliquos citra societatem suscepta. Rerum communio sic inter aliquos constituta, sive hæreditatis inter cohæredes, sive rerum singularum inter eos, quibus eadem res legata aut donata est, quive simul eandem rem emerunt sine affectione societatis, duarum rerum obligationem parit; nam et consortem ad rerum divisionem obligat, et in communione manenti præstationibus quibusdam, ad eam communionem pertinentubus, implicat (l. item, Labeo. 22, § 4, fam. erc. l. 4, § 3, comm. divid.). Prima et præcipua hic obligatio est, quod consors, si sponte communionem omittere nolit, compellatur ad divisionem judicio divisorio; in quo hoc maximè agi constat, ut sua cuique parte adjudicata, à communione quam nec suscipere, nec retinere quisquam cogitur (l. 26, § 4, de cond. ind. l. ultim. C. comm. div. discedatur. l. 1, fam. erc. l. 1, comm. divid. § quædam. 20, 1 inf. ce act.). Divisio rerum qualis sit, quæ in ea adjucatio, quæve mutua condemnatio, explicatur § 4, et seqq. inf. de offic. jud. Præstationes personales inducuntur vel lucri, vel damni, vel impensarum nomine. (l. 3, comm. div.) Lucri, ut, si quid ad unum è consortibus ex re communi pervenit, id cæteris communicet. (l. 3, C. eod. d. § 4, inf. de off. jud. et hoc text.) Damni, ut, si quid damni in re communi datum aut factum est culpa aut negligentia unius, id cæteris proportione cujusque sarciat (l. 16, § pen. l. hæredes. 25, § non tantum. 16, et § item culpa. 18, l. inter cohæredes. 44, quod ex fact. 5 fam. ercisc.). Culpa autem non ad exactissimam diligentiam dirigitur; quonian, qui rem cum alio communem habet, propter suam partem causam habet gerendi; et ideo non major diligentia ab eo exigitur, quam qualem suis rebus adhibere consuevit. (d. l. hæredes. 25, § non tantum. 16). Impensarum, ut, si quæ ab uno in res communes factæ sunt, quas propter partem suam necesse habuit facere, ei à cæteris pro rata refundantur." Vinnius, Comm. ad Inst. Lib. 3, tit. 28, § 3, p. 716, 717, edit. 1726. The doctrine of the text, as stated by Pothier and upheld by the Roman law, is, probably, to be received with the qualification, that the repairs have been made without any actual knowledge or dissent of the other owners; for by the French law, as we shall immediately see, the majority of the owners in interest have the entire control and management of all the concerns of the ship; and, by the Roman law, even in cases of partnership, one partner alone

§ 427. In the next place, as to the employment and equipment of the ship for any voyage or adventure. We have already seen that, in cases of partnership at the common law, the majority of the partners, in the absence of all contrary stipulations, possess entire authority to regulate and transact all the concerns of the partnership; and that this majority is to be decided by the majority of persons, and not by that of interest in the partnership.[1] The French law has, on this point, adopted the rule of the common law; and each, in this respect, differs entirely from the Roman law, by which (as we have seen) a single partner might prohibit, as far as he was concerned, any particular act or contract of the other partners, so that it should not bind him.[2] But, in relation to the part-owners of ships, a different rule prevails at the common law; for (as we have seen) no one or more of the owners, whether a majority or a minority, can, by incurring expenses or making repairs upon the ship, oblige the other owners to contribute thereto, unless they have expressly or impliedly consented to the same.[3]

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might, by his single prohibition, prevent the others from binding him by any of their acts or contracts. Ante, § 124.

[1] Ante, § 123, 124. See 3 Kent, Comm. Lect. 45, p. 153, 154, 155, 4th edit.

[2] Ante, § 124; 3 Kent, Comm. Lect. 45, p. 153, 154, 155, 4th edit.

[3] Abbott on Shipp. Part 1, ch. 3, § 2, p. 70, 71, 5th edit.; Ante, § 123, 124. — The case of The Steamboat New Orleans v. Phœbus, 11 Peters, R. 175, is directly in point. The English authorities above cited seem to leave the matter in doubt. Upon principle, there does not seem any just reason why the minority should not possess the same rights, as to the employment of the ship, as the majority, if the latter refuse to employ her. And the policy of the general rule would seem fairly to reach such a case, since otherwise the ship must remain unemployed, and earn no freight for any one. See 3 Kent, Comm. Lect. 45, p. 151, 152, 156, 4th edit.

§ 428. What, then, it may be asked, is to be done in case of any dissent by one or more of the part-owners, not only as to the repairs, but as to the employment of the ship upon any projected voyage or adventure? Is the ship to remain idle, and rot at the wharf? Or, may the ship be equipped and employed, so as to earn freight and subserve the general commercial policy of the country, as well as the private interest of the other owners? The common law has here adopted and followed out the doctrines of Courts of Admiralty, founded upon the enlarged and equitable principles of maritime jurisprudence. It authorizes the majority, in value or interest, to employ the ship upon any probable design; and yet, at the same time, it takes care to secure the interest of the dissentient minority from being lost, in any employment which he or they disapprove.[1] If the majority choose, therefore, to employ the ship upon any particular voyage or adventure, they have a right so to do, upon giving security by stipulation to the minority, if required, to bring back and restore the ship to them, or in case of her loss, to pay them the value of their shares.[2] When this is done, the dissentient part-owners bear no portion

[1] Abbott on Shipp. Pt. 1, ch. 3, § 2, p. 70, 71, 5th edit.; Godolphin on Adm. Jurisd. Introd. p. 13; The Apollo, 1 Hagg. Adm. R. 306, 312; In the matter of Blanshard, 2 Barn. & Cresw. 244, 248, 249; Molloy, de Jure Marit. B. 2, ch. 1, § 2, p. 308, 10th edit. 1778; Id. § 3, p. 310; Sir Leoline Jenkins's Works, by Wynne, vol. 1, p. 76, 84; Id. p. 792; Jacobsen's Sea Laws, by Frick, ch. 3, p. 43, 44, 45, edit. 1818.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 3, p. 70, 5th edit.; 3 Kent, Comm. Lect. 45, p. 151, 152, 4th edit.; Collyer on Partn. B. 5, ch. 4, § 4, p. 806, 807, 808, 2d edit.; Molloy, B. 2, ch. 1, § 3; 2 Bro. Civil and Adm. Law, 131; The Apollo, 1 Hagg. Adm. R. 306; Ex parte Blanshard, 2 Barn. & Cresw. 244, 249; Willings v. Blight, 2 Peters, Adm. R. 288; Sea Laws, 441, edit. 1705; Card v. Hope, 2 Barn. & Cresw. 661, 674, 675; The Steamboat New Orleans v. Phœbus, 11 Peters, R. 175.

of the expenses of the outfit; and they are not entitled to share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit, of the others.[1] And a complete jurisdiction exists in the Court of Admiralty, not only to compel such a stipulation to be given by the majority at the instance of the minority; but, also, if the ship is in possession of the minority, to compel the delivery thereof upon giving such a stipulation to the majority.[2]

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[1] Ibid.; Sir Leoline Jenkins's Works, by Wynne, vol. 1, p. 76; Id. p. 792; Jacobsen's Sea Laws, ch. 3, p. 43, 44, 45, edit. 1818.

[2] Ibid.; The John of London, 1 Hagg. Adm. R. 342, 346; The Pitt, 1 Hagg. Adm. R. 240.—Mr. Abbott has stated the whole doctrine with great clearness and accuracy in the passage above referred to. He says: "The law of this country appears to possess an important advantage over all the ordinances that have been cited; because, while it authorizes the majority in value to employ the ship 'upon any probable design,' it takes care to secure the interest of the dissentient minority from being lost in the employment, of which they disapprove. And for this purpose it has been the practice of the Court of Admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but she sails wholly at the charge and risk, and for the profit of the others. This security may be taken upon a warrant obtained by the minority to arrest the ship. And it is incumbent on the minority to have recourse to such proceedings, as the best means of protecting their interest; or, if they forbear to do so, at all events they should expressly notify their dissent to the others, and if possible, to the merchants also who freight the ship. For it has been decided, that one part-owner cannot recover damages against another, by an action at law, upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. And it has also been decided in the Court of Chancery, that one part-owner cannot have redress in equity against another for the loss of a ship sent to sea without his assent. These decisions are consonant to the general rule of law, that where one tenant in common does not destroy the common property, but only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by

On the other hand, if the majority do not choose so to employ the ship, the minority possess the same right upon giving the like security, and are in like manner to be entitled to all the profits of the voyage or adventure, and are to bear all the expenses and outfits and risks thereof.[1]

§ 429. In this respect the common law differs essentially from the French law.[2] The French law, in the absence of any positive stipulation of the part-owners to the contrary, gives complete authority to a majority in interest (not in number) to make repairs and incur expenses on the ship for the common benefit, to which all the other joint owners will be bound to contribute, notwithstanding their dissent. The Ordinance of Louis 14th, of 1681, expressly declares, that in all things

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his companion. And in a case tried before Chief Justice King, wherein it appeared, that one part-owner had forcibly taken a ship out of the possession of another, secreted it, and changed its name; and that it afterwards came into the possession of a third person, who sent it to Antigua, where it was sunk and lost; the Chief Justice left it to the jury to say, under all the circumstances of the case, whether it was not a destruction of the ship by the means of the defendant; and they finding it to be so, the plaintiff recovered the value of his share. The Court of Common Pleas afterwards approved of the direction of the Chief Justice. If a part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss. If the minority happen to have possession of the ship, and refuse to employ it, the majority also may by a similar warrant obtain possession of it, and send it to sea, upon giving such security." Post, § 434.

[1] The Steamboat New Orleans *v.* Phœbus, 11 Peters, R. 175; The Apollo, 1 Hagg. Adm. R. p. 306, 312; Ex parte Blanshard, 2 Barn. & Cresw. 244, 249. See Godolph. Adm. Jurisd. Introd. p. 13; Molloy, Jure, Marit. B. 2, ch. 1, § 2; Abbott on Shipp. Pt. 1, ch. 3, § 6, p. 74, 75, 5th edit.; 2 Bro. Civ. and Adm. Law, 131; Sea Laws, 442, 3d edit.; Willings *v.* Blight, 2 Peters, Adm. R. 288; 3 Kent, Comm. Lect. 45, p. 155, 156, 157, 4th edit.; Ante, § 427, note (3). But see The Elizabeth & Jane, 1 W. Rob. New Adm. R. 278.

[2] See 1 Valin, Comm. Liv. 2, tit. 8, art. 4, p. 575 to 584, edit. 1766; Abbott on Shipp. Pt. 1, ch. 3, § 3, p. 69, 5th edit.

which concern the common interest of the proprietors of the ship, the opinion of the majority shall be followed; and that shall be reputed to be the majority which holds the largest shares of the ship.[1] In this respeet the French law seems to have followed out the doctrine promulgated upon some other occasions in the Roman law. Such, for example, as in the case of creditors — *Pari autem quantitate debiti inventa, dispari vero creditorum numero; tunc amplior pars obtineat, ita, ut quod pluribus placeat, hoc statuatur.*[2] And again, in the case of the arbitrators: *Judicium enim integrum est, quod plurimorum sententiis comprobatur.*[3] And again: *Majorem esse partem, pro modo debiti, non pro numero personarum, placuit;*[4] and again; *Quod major pars Curiæ effecit, pro eo habetur, ac si omnes egerint.*[5] And in answer to the question, what, in a just sense, may be deemed repairs or expenses for the common benefit, Valin does not scruple to declare, that they are such as are reasonable and fit, in order to put the ship in a state to earn freight, and to be suitably navigated during the contemplated voyage or adventure.[6]

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[1] 1 Valin, Comm. Liv. 2, tit. 8, art. 6, p. 575. The present commercial code of France gives the like authority. Code de Comm. art. 220; Boulay Paty, Droit Comm. Tom. 1, tit. 3, § 5, p. 340; Emerigon, Traité a la Grosse, ch. 4, § 4, Tom. 2, p. 427, edit. 1783; Pardessus, Droit Comm. Tom. 3, art. 621, p. 43, 44; 3 Kent, Comm. Lect. 45, p. 155, 156, 157, 4th edit.

[2] Cod. Lib. 7, tit. 71, l. 8, cited 1 Valin, Comm. Liv. 2, tit. 8, art. 4, p. 575; Dig. Lib. 2, tit. 14, l. 8; Kuricke ad Ordin. Hanseat. tit. 5, art. 7, p. 758, 759.

[3] Cited 1 Valin, Comm. 575. See also Dig. Lib. 50, tit. 1, l. 19; Id. Lib. 4, tit. 8, l. 17, § 7; Id. l. 27, § 3.

[4] Dig. Lib. 2, tit. 14, l. 8; cited 1 Valin, Comm. 576.

[5] Cited 1 Valin, Comm. 577; Dig. Lib. 50, tit. 1, l. 19. See also the passage, Dig. Lib. 17, tit. 2, l. 52, § 10, referred to Ante, § 424, note (3).

[6] 1 Valin, Comm. Liv. 2, tit. 8, art. 5, p. 579.

§ 430. The laws of other foreign maritime nations seem generally to coincide with these provisions of the French law, and abundantly show, that the doctrine is not founded upon any peculiar policy of France.[1] The Ordinances of the Hanse Towns of 1591 and 1614, expressly affirm the doctrine, stating it, in one place, to be conformable to ancient usage; and, in another place, to be conformable to the ancient usages of the sea.[2]

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[1] Styppman, Jus. Marit. p. 416, n. 101 to 104; Script. de Jure Nautic. Fascic. Heineccii, p. 416, edit. 1740; Kuricke, Jus. Hanseat. art. 5, 7, p. 755, 758, 759; Boulay Paty, Droit Comm. Tom. 1, tit. 3, § 5, p. 344 to 346; Jacobsen's Sea Laws, by Frick, ch. 3, p. 40, 41, edit. 1818.

[2] Pardessus, Collect. de Lois Marit. Tom. 2, p. 526; Droit Marit de la Ligue Anseatique Reces de 1591, art. 57; Id. Reces de 1614, art. 7, p. 546; Abbott on Shipp. Pt. 1, ch. 3, § 3, p. 70; Cleirac, Us et Coutum. Ord. Hans. art. 59, p. 211, edit. 1661; Id. p. 107, edit. 1788; Malyne, Lex Merc. p. 128, edit. 1636. — I copy from Pardessus's unrivalled edition, in this and the following citations. Kuricke, in his Commentaries on the Hanseatic Ordinance (Kuricke, Jus. Hanseat. tit. 5, art. 7, p. 758, 759, edit. 1740), gives the general provisions of the principal ordinances of different countries. His language is: "Jus Wisbycen. art. 65, hoc in casu, quando nimirum inter exercitorem et nauclerum conveniri non potest, statuit, nauclerum nihilominus posse navim illam ducere pro naulo, quod viri boni æquum esse judicaverint. Et art. 66, in genere sancitur, quod omnes exercitores, quidquid in reparationem navis nauclerus impenderit, vel etiam pro ejusdem necessitate emerit, ad obulum usque solvere teneantur. Jus Pruthenicum (l. 4, tit. 19, art. 4, § 3), generaliter vult, quod illi, qui minores partes in navi habent, sequi debeant eos, qui plus in eis possident. Jus vero Lubecense (l. 6, tit. 4, art. 6), alternative idem statuit, nimirum illos, qui minus in navi possident, reliquos, qui plus tenent, aut sequi, aut totam navim certa pecunia æstimare debere, optione aliis data, utrum tantumdem dare, aut accipere velint, emptoremque reliquis exercitoribus pecuniam istam intra sex hebdomadas postmodum solvere teneri. Jus Danicum artic. 61, idem præcipit, et addit, quod si nulla ratione inter se convenire possint, navim tamen otiosam jacere non oporteat, sed exercitorum potior pars illam in suum commodum, suo periculo, exercere possit; illis vero, qui exercere navem noluerunt, nulla vecturæ portio danda sit. Eodem etiam tendunt Statut. Hamburg. (Part. 2, tit. 13, artic. 2, et Grot. d. intr. part. 23). Utut autem hæc expediti sint juris eo in casu, ubi plures exercitores existunt, quæri tamen potest, quid hoc in casu, ubi duo tantum sunt exercitores, et

The ordinance of Rotterdam of 1721;[1] that of Hamburg of 1276;[2] that of Lubec of 1299;[3] and also the laws of Wisbuy (although not printed in the common editions),[4] contain provisions to the same effect.

§ 431. It has been supposed by a learned writer upon this subject, that the common law has in this respect an important advantage over all these ordinances; because, while it authorizes the majority in value to employ the ship upon any probable design,

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quidem inter se dissentientes, juris sit? Certe quum prævalere debere, qui navim navigare, quam otiosam domi manere mavult, inde concludi potest, quod Ulpianus dissertis verbis in (l. 12, § 1 ff. de usufruct.) scribat: Navis usufructu legato, navigatum mittendam navim, licet naufragii periculum immineat; navim enim ad hoc parari, ut naviget, dummodo tamen id apto et non adverso navigationis tempore fiat, navisque idoneis hominibus committatur (l. 16, § 1, et l. 36, in fin. ff. de R. V.) et gubernatore sit instructa (l. 13, § 2, ff. locat)." See also Emerigon, Traité des Contrats a la Grosse, ch. 4, § 4, p. 427, 428, edit. 1783; Id. 454, 455, Edit. of Boulay Paty, 1826.

[1] Ordin. of Rotterdam, 1721, art. 172; 2 Magens on Insur. 108; Abbott on Shipp. Pt. 1, ch. 1, § 3, p. 70, 5th edit.; 3 Kent, Comm. Lect. 45, p. 153, 4th edit.

[2] Ordin. of Hamburg, 1276, art. 24; Pardessus, Collect. de Lois Marit. Tom. 3, p. 346.

[3] Ordin. of Lubec, 1299, art. 25; Pardessus, Collect. de Lois Marit. Tom. 3, p. 410.

[4] Laws of Wisbuy, 1841, art. 65, 66; Pardessus, Collect. de Lois Marit. Tom. 1, p. 522, 523. See also Pardessus's note to Tom. 1, p. 522, 523, notes 9, 10, and his note to Tom. 2, p. 526, n. (2). In these notes he states, that these articles are not found in the editions of 1505, or the MSS. of 1533 and 1537, but are in that of 1541, of Gripswald. The Consolato del Mare gives to the master-owner (Patron, Segnor de la Nau), who undertakes to build a ship, a right to compel other persons, who have engaged to take particular shares in the ship, to pay their proportions of the expenses of building the same; or, upon their default, to hire money on their shares for the same purpose. Consolato del Mare, ch. 3, [48], as given in Pardessus, Collect. de Lois Marit. Tom. 2, p. 50. I have not discovered in that venerable collection any traces of the law as to the employment and outfits of the ship, when some of the owners dissent. See also Jacobsen's Sea Laws, by Frick, ch. 3, p. 40 to 43, edit. 1818.

it takes care to secure the interest of the dissentient minority.[1] Perhaps it may not be so very manifest, that such an advantage really exists; for, although the majority are thus entitled to employ the ship, yet the minority cannot derive the slightest advantage from that employment; and they may, and indeed must, be affected somewhat in their interest from the natural diminution of value of the ship, by the mere wear and tear of the voyage or adventure, even if no accident occurs to prevent her safe return. It is nowhere affirmed, that the minority are entitled to any compensation for such diminished value; and the general theory of the common law upon the rights of part-owners, certainly authorizes every part-owner to use the ship for his own purposes, without any liability to repair the natural or necessary waste or decay occasioned thereby. On the other hand, although the foreign laws and ordinances give the majority the right to impose the burden of sharing the expenses upon the minority; yet the latter are to share fully in the profits, if any, in the voyage or adventure, according to the well-known maxim: *Secundum naturam est, commoda cujusque rei, eum sequi, quem sequuntur incommoda.*[2]

§ 432. The common law not only thus gives to the majority in interest of the part-owners the right and authority to employ the ship upon any proper voyage or adventure; but also confers upon the majority the

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 4, p. 70.

[2] 1 Valin, Comm. Liv. 2, tit. 8, art. 5, p. 577 to 579; Dig. Lib. 50, tit. 17, l. 10. — The Danish Ordinance, art. 61, according to Kuricke, is similar to the law of England. See above, § 430, note (3); Jacobsen's Sea Laws, by Frick, ch. 3, p. 37, 40 to 43.

right and authority in all cases to appoint the master and officers and crew of the ships, and to displace them at their pleasure, even although the master should be a part-owner.[1] But, then, this authority must be exercised by a free and impartial judgment in the choice of the master and officers and crew, and especially in the choice of the master, who is intrusted with the management of the outfit, and with the navigation of the ship. Any contract, therefore, made by some of the part-owners only, which is calculated to have the effect of fettering their judgment, and of binding them to appoint, or to concur in the appointment of particular persons as master and officers, is a violation of that duty. The violation of duty becomes greater and more odious, if the contract is founded upon motives of peculiar gain and advantage to the contractors; for all the part-owners ought to share ratably in every profit that may be made of the ship. And if such contracts could be allowed by law, they must operate as a discouragement to persons to become part-owners of ships.[2] Indeed, the duty is not owing singly to the other part-owners, and to charterers (if any), but also to all whose life or property may be embarked in her. Such a contract is, therefore, utterly void, as against public policy, and the true interests of commerce and navigation. Upon this ground a contract, made by two part-owners, who were the ship's husbands, with a third person to sell him a part of their shares, and he to be appointed master (they holding the majority of interests), and they

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[1] This is also the rule of the French law. Boulay Paty, Droit Comm. Tom. 1, tit. 3, § 5, p. 340.

[2] Card *v.* Hope, 2 Barn. & Cresw. 661, 674, 675. I have followed nearly the very words of Lord Tenterden, in his able judgment in this case.

to be continued as the ship's husbands, and he or they to have the appointment of his successor, as master, has been held to be utterly void.[1]

§ 433. We have already seen that the French Ordinance declares, that the opinion of the majority of the owners of a ship, is to govern in every thing which concerns the common interest of the owners. (*En tout ce, qui concerne l' intéret commun des propriétaires.*)[2] But the question, as to the extent of the power of the majority to bind the minority by their acts, or, in other words, what is to be deemed in the sense of the Ordinance for the common interest, is a matter still left open to construction and interpretation. Here, Valin is very explicit; and he declares that it extends not only to the repairs of the ship, but to the enterprise and voyage in which the ship is to be engaged, to the choice of the master, officers, and crew, and also to the outfits and engagements for the voyage. But it does not extend to any right to compel the dissenting owners to contribute their shares to a cargo for the ship for the same voyage.[3] As to the repairs and other legitimate expenditures and charges for the voyage, if the dissenting owners refuse to contribute their shares, it is competent for the majority, after such refusal and due proceedings had, to take up the amount on bottomry for the account and risk of the dissenting owners.[4]

§ 434. But suppose a majority of the owners are

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[1] Card v. Hope, 2 Barn. & Cresw. 661, 674, 675.

[2] Ante, § 429.

[3] 1 Valin, Comm. Liv. 2, tit. 9, art. 5, p. 576 to 580, edit. 1766. Pardessus, Droit Comm. Tom. 3, art. 621, p. 44, 45; 3 Kent, Comm. Lect. 45, p. 156, 157, 4th edit.

[4] 1 Valin, Comm. Liv. 2, tit. 8, art. 5, p. 576, 577, 679; Pardessus, Droit Comm. Tom. 3, art. 621, p. 44, 45, 46.

against any employment of the ship upon any adventure or voyage whatsoever at a particular period, as not being for the interest of the concern, and the minority are, at the same time, ready and willing to employ the ship upon a particular adventure or voyage, the question then arises whether, in the sense of the Ordinance, the majority have still the right to control the minority, and prevent any such employment. The answer given by Valin, in the affirmative, seems entirely satisfactory in its reasoning, as a just exposition of the Ordinance.[1] Whether the common law has adopted the like rule seems, in the present state of the authorities, doubtful,

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[1] 1 Valin, Comm. Liv. 2, tit. 3, art. 5, p. 582, 583; Boulay Paty, Droit Comm. Tom. 1, tit. 3, § 5, p. 344, 345 to 348; Kuricke, Jus Hanseat. tit. 5, art. 7, p. 758, 759, edit. Heinecc. Scrip. Naut. Fascic. edit. 1740. Several of the maritime Jurists of other countries entertain a different opinion. Mr. Chancellor Kent has summed up the opinions on each side with his usual ability and accuracy. "By the French law, the majority in interest of the owners control the rest, and in that way one part-owner may govern the management of the ship, in opposition to the wishes of fifty other part-owners, whose interests united are not equal to his. This control relates to the equipment and employment of the ship, and the minority must contribute. But they cannot be compelled to contribute against their will, for the cargo laden on board, though they will be entitled to their portion of the freight. If the part-owners be equally divided on the subject, the opinion in favor of employing the ship prevails, as being most favorable to the interests of navigation. Many of the foreign Jurists contend, that even the opinion of the minority ought to prevail, if it be in favor of employing the ship on some foreign voyage. Emerigon, Ricard, Straccha, Kuricke, and Cleirac, are of that opinion. But Valin has given a very elaborate consideration to the subject, and he opposes it on grounds that are solid, and he is sustained by the provisions of the old ordinance and of the new code. Boulay Paty follows the opinion of Valin and of the codes, and says that the contrary doctrine would enable the minority to control the majority, contrary to the law of every association, and the plainest principles of justice. The majority not only thus control the destination and equipment of the ship, but even a sale of her by them will bind the right of privileged creditors after the performance of one voyage by the purchaser, but not the other part-owners."

although the old writers manifestly lean in favor of it.[1]

§ 435. A question far more nice and difficult is, to decide what is to be done where the part-owners have equal interests, and are equally divided as to the employment of the ship upon any particular voyage or adventure. Within this predicament several cases may arise: (1.) Where the part-owners are equally divided as to the employment of the ship upon any voyage or adventure whatsoever, one being in favor and the other against any such employment, upon the ground, that at the time it will be either unprofitable, or very hazardous, under all the circumstances; (2.) Where each part-owner is equally willing to have the ship employed in some voyage or adventure, but they differ as to the voyage; or, (3.) Where each part-owner is ready to take the whole ship for a voyage, to be planned by himself, but he will not engage with the other in any voyage whatsoever. What is to be done in such a case? An opinion has been expressed by certain learned writers that, in the first case, the part-owner who is willing to employ the ship for a voyage or adventure is entitled to have it delivered to him for that purpose, upon giving the usual security; and this, indeed, seems to be the actual practice in the Admiralty of England.[2]

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[1] Willings *v.* Blight, 2 Peters, Adm. R. 288; Abbott on Shipp. Pt. 1, ch. 3, § 4, 5, 6, p. 70 to 76; Ante, § 427, 428. See The Elizabeth & Jane, 1 W. Rob. New Adm. Rep. 278.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 6, p. 75, 5th edit.; Molloy, de Jure Marit. B. 2, ch. 1, § 2, p. 308, 10th edit. 1778; 1 Montagu on Partn. B. 2, ch. 1. Molloy holds this opinion. Molloy, de Jure Marit. B. 2, ch. 1, § 2,

§ 436. Cleirac adopts the like opinion, in which he has also the support of other Jurists.[1] Straccha, in particular, puts the case directly. *Et ego fingo tibi questionem: Duos esse Dominos navis, alterum velle congruo tempore adnavigandum ipsam navim navigatum mittere, alterum vero malle in portu permanere; et præferendum illum existimo, qui rem ad usum paratum uti velit, et utiliter agere, recusante socio.*[2] The reason seems to be, that ships are designed for navigation; and, thus employed, they support a great public commercial policy.[3] The French Ordinance seems to justify the same course, leaving, however, the question, as to the propriety of the projected voyage, open for discussion.[4]

§ 437. But the two last cases (there being an equality of interests) have been thought by some distinguished Jurists to be wholly unprovided for by the common law; for, under such circumstances, there seems to be no ground for giving any preference to either part-owner.[5] In cases of this sort, there is no

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p. 308, 10th edit. 1778. But see The Elizabeth & Jane, 1 W. Rob. New Adm. R. 278.

[1] Cleirac, Us et Cout. de la Mer, Ordin. Hanseat. Comm. art. 59, p. 211, edit. 1661; Straccha, de Navib. Pars 2, n. 6.

[2] Straccha, de Navib. Pars 2, § 6, p. 420, edit. 1669.

[3] See Cleirac, Us et Coutum. de la Mer, Ord. Hans. Comm. art. 59, p. 211, edit. 1661; 1 Valin, Comm. Liv. 2, tit. 8, art. 5, p. 585, 586; Kuricke, Jus Hanseat. tit. 5, art. 7; Script de Jure Naut. et Marit. Fascic. p. 758, 759, edit. 1740; Ante, § 429, 430, note (3).

[4] 1 Valin, Comm. Liv. 2, tit. 8, art. 6, p. 585, 586.

[5] Abbott on Shipp. Pt. 1, ch. 3, § 5, p. 72 to 76, 5th edit.; Id. § 7, p. 75, 76; Ouston *v.* Hebden, 1 Wils. R. 101.—In this case a part-owner, possessed of a small share, instituted a suit in the Court of Admiralty, against the major part-owner, who was also master, and who insisted upon making a voyage with the ship, praying that the ship might be sold, or the party have such other remedy as might be thought proper by the Admiralty; and the other applied to the Court of King's Bench to prohibit the Admi-

doubt that, under the Ordinance of France, of 1681 a sale may be decreed to be made by the proper tribunal, and the proceeds divided among the owners according to their respective shares.[1] Malyne evidently supposes that the general maritime law authorizes a sale to be made by the proper Court of Admiralty, in all cases where, by reason of the disagreement of the part-owners, the ship cannot be employed, whether there be an equality in the dissenting interests or not.[2] Molloy adopts the same opinion; and it has apparently the support of others of the Old English maritime writers, as a generally recognized practical rule.[3] The Consolato del Mare seems to uphold the doctrine that, at least after the first voyage of a ship which is owned by the master and other persons, the

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ralty from proceeding in the suit. But Chief Justice Lee said: "I have no doubt but the Admiralty has a power in this case to compel a security, and this jurisdiction has been allowed to that Court for the public good. Indeed the Admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence; or we may grant a prohibition against selling, or compelling the party to sell, or to buy the shares of others." This was agreed to by the whole Court, and the case ended by prohibiting the Court of Admiralty to direct a sale, but leaving the Court at liberty to compel security.

[1] 1 Valin, Liv. 2, tit. 8, art. 6, p. 584, 585, 586; Boulay Paty, Droit Comm. tit. 3, § 5, p. 359 to 366; Emerigon, Traité a la Grosse, ch. 4, § 4, p. 427, 428, edit. 1783; Id. p. 454, 455, edit. of Boulay Paty, 1827; Pardessus, Droit Comm. Tom. 3, art. 623, p. 46, 47; Abbott on Shipp. Pt. 1, ch. 3, § 7, p. 75, 76, 5th edit. — The present Commercial Code of France also provides, that the vessel shall not be adjudged to be sold in order to a distribution of the proceeds among the joint owners, except upon the application of a moiety in value of the said owners, unless there be a written agreement to the contrary. Code de Commerce, art. 220; Locrè, Esprit de Code de Commerce, Tom. 2, p. 52, 53, 54; Boulay Paty, Droit Comm. de France, Tom. 1, tit. 3, § 5, p. 339 to 366.

[2] Malyne, Lex Merc. ch. 30, p. 120, 121, edit. 1636.

[3] Molloy, de Jure Marit. B. 2, ch. 1, § 3, p. 310, edit. 1778; 2 Brown, Civ. and Adm. Law, 131.

part-owners may compel a sale of the ship, in case of a disagreement between them.[1] The law of Scotland gives a right, as it should seem, in all cases, to the dissenting partners, to offer their shares for sale to the other owners at a particular price; and, if this offer is not accepted, then to require a judicial sale to be made of the ship, and the proceeds to be divided among them.[2]

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[1] Pardessus, Collect. de Lois Marit. Tom. 2, p. 62, citing Consolato del Mare, art. 10 [55]; Id. p. 207, citing Consol. del Mare, art. 184 [229]; Id. p. 233, citing Consol. del Mare, art. 199 [244]; Id. p. 237, 238, citing Consol. del Mare, art. 200 [245].

[2] Bell's (Wm.) Dict. of Law of Scotland, voce, Sett., Action of, p. 910; Id. Ship. p. 915, edit. 1838; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 11, p. 504, 5th edit.; 3 Kent, Comm. Lect. 45, p. 153, 4th edit., note (b.) — In the work called "The Sea Laws," the like doctrine is affirmed. Sea Laws, p. 441, edit. 1705. In several of the foreign ordinances an alternative is given to the dissenting part-owners, either to buy, or to sell their respective shares in the ship at a fixed price; and if they refuse, the majority or a minority may employ the ship in navigation. See Kuricke, Jus. Hanseat. tit. 5, art. 7; Script. de Jure Naut. et Merit. Fasc. p. 758, 759, edit. 1740 Heinec. See also the opinion of Mr. Justice Washington, in Brooks & Davis v. The Seneca, 18 American Jurist (Jan. 1838), p. 486, 490, 491. Mr. Justice Washington in this case said: "Our attention is then invited to the civil law, or rather to the Roman marine code, another legitimate source of general maritime law; in which we find sundry wise provisions for adjusting disputes between part-owners of vessels, from which the three following rules may be deduced. (1.) That the opinion and decision of the majority in interest of the owners, concerning the employment of the vessel, is to govern; and, therefore, they may, on any probable design, freight out or send the ship to sea, though against the will of the minority. (2.) But if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since, in such a case, the minority can neither employ her themselves, nor force the majority to do so, the vessel may be valued and sold. (3.) If the interests of the owners be equal, and they differ about the employment of the vessel, one half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out." Mr. Bell, speaking on this subject, after stating the English rule, says: "In Scotland the remedy has been by sale.

§ 438. It has also been generally supposed, that, according to the common law of England, in no case whatsoever of a disagreement of the part-owners, as to the employment of the ship upon any particular voyage, does there exist any jurisdiction in the Court of Admiralty (and, if that Court has it not, no other Court has), to order a sale thereof, whether the ship be owned in equal, or in unequal shares. It is true, that the terms of the commissions, granted to the Judges of that Court, include jurisdiction of all matters, which concern owners and proprietors of ships, as such.[1] But this jurisdiction of the Courts of Admiralty has been exercised for the last two centuries in England, if one may so say, *in vinculis,* in consequence of the severe penalties imposed

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Not only in the case of equality, but even where the minority opposed the employment, the dissentient owners, minority, or equal, have, in admiralty, been entitled to insist, either for a sale, or that, at a price put on the shares, the other owners shall purchase their shares, or be obliged to part with their own. This doctrine was grounded on the consideration, that part-owners, though not properly copartners, frequently suffer by the contracts or delinquencies of shipmasters, perhaps not of their own choosing; for which they are answerable, at least to the value of their own share. And the same doctrine, though not supported by such considerations of hazard, was, in modern times, applied to the case of a brewery held in common. Which of these rules ought now to prevail in this united country, it might be presumptuous to say. But it may be necessary to reconcile them in some future case, in which the property comes to be mixed, and persons of both countries concerned in the same vessel. Perhaps the course followed in England may be followed on the same principles of equity, which have recommended it to adoption by the Court of Chancery in England, as a measure of less harshness, and less attended with peril, than the remedy which we have long used." 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 1, p. 503, 5th edit. See also Jacobsen's Sea Laws, by Frick, ch. 3, p. 40 to 43, edit. 1818. But see The Elizabeth & Jane, 1 Wm. Rob. New Adm. R. 288.

[1] Godolphin, Adm. Jurisd. 43; Laws of the Sea, p. 259, edit. 1705; De Lovio *v.* Boit, 2 Gallis. R. 470, note (7); Roughton's Articles, Art. 1633; Clerke's Praxis, p. 145, edit. 1798.

upon the Judges by statute, if they should happen unintentionally to exceed their true jurisdiction; and the open hostility and prohibitory interference of the Courts of common law.[1] The commissions have thus become practically much narrowed in the import of their terms, by the construction of these latter Courts.[2] It was positively, although incidentally, asserted by Lord Chief Justice Lee, in a case in the King's Bench, in the reign of George the Second, that the Court of Admiralty has no authority to compel a sale in any case of disagreement whatever between part-owners.[3] If this doctrine be in reality established in the common law of England, it is a reproach both to its equity and its justice; for it leaves the part-owners of ships without any remedy whatsoever, in cases where irreparable injuries may arise from an equality of division in interests and opinions, without any fault or wrong on either side. Upon what ground it has been asserted, it is difficult to perceive. It certainly has no support in the positive maritime law of other countries, or in the ancient principles of maritime jurisprudence.[4] All these point the other way. The Admiralty Courts of England have never of themselves adopted any such limited doctrine; but have always contended for the exercise of the full jurisdic-

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[1] See De Lovio v. Boit, 2 Gallis. R. 398, &c.

[2] The Apollo, 1 Hagg. Adm. R. 306, 309. — The late Act of Parliament (statute of 3d and 4th Victoria, ch. 65), has in a great measure restored to the Court of Admiralty its ancient jurisdiction, as well as independence; and it exhibits the complete triumph of principles of public policy and convenience over mere technical doctrines, and the stern opposition of the Courts of common law.

[3] Ouston v. Hebden, 1 Wilson, R. 101; Abbott on Shipp. Pt. 1, ch. 3, p. 73, 74, 5th edit.; Jacobsen's Sea Laws, by Frick, ch. 3, p. 43, 44, edit. 1818; 1 Montagu on Partn. B. 2, ch. 1.

[4] Ante, § 435, 436, 437.

tion as rightful, although they have been practically compelled to surrender it under the imposing authority of the Courts of common law.

§ 439. In America a strong disposition has been manifested to assert the right and duty of Courts of Admiralty to decree a sale of the ship, in cases of an equal division of voices and interests, as to undertaking a particular voyage or adventure. It has been recognized upon several occasions, as being within the true scope of the Constitution of the United States, a case of admiralty and maritime jurisdiction; and it is sustained by reasoning which it is difficult to overturn, unless by striking out of the commission the whole authority of the Admiralty in cases of controversies between part-owners; and also by disregarding the common usages, which have prevailed among maritime nations from an early period, and which constitute the basis of the general maritime law, as well as of the positive codes, which affirm and enforce it.[1] The right

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[1] Ante, § 435, 436, 437; and note (2), p. 612. — In the case of Skrine *v.* The Sloop Hope (Bee's Adm. R. p. 2), Judge Bee declared a sale of a ship upon a petition of one part-owner against another part-owner. But the question was very elaborately discussed on both sides, by very able counsel, in the case of Davis & Brooks *v.* The Brig Seneca, Gilpin, R. p. 10. The learned Judge of the District Court (Judge Hopkinson) pronounced an opinion against the jurisdiction of the Court to decree a sale, the case being that of the part-owners being equally divided in opinion, and each wishing to employ the brig upon a distinct voyage. Upon appeal, Mr. Justice Washington reversed the decree, and directed a sale; and the parties submitted to his decision. Upon that occasion Mr. Justice Washington relied upon the French Ordinance, not as a mere matter of positive regulation, but as an exposition of the general maritime law; and afterwards he added: "Having ascertained the true meaning of this article of the French Marine Ordinance, its authority, or the influence which it should have in deciding this cause, is next to be considered. It is insisted by the counsel for the appellee, that this article is nothing more than a part of the local law of France, founded upon the Roman law of licitation adopted by France, applicable to the par-

to order a sale of property, subjected to its jurisdiction, is clearly a matter within the competency of a Court

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tition of property, movable and immovable, which is held in common by two or more persons, which, without a sale, could not be otherwise conveniently divided between them. And, in support of this argument, it is remarked, that the expressions of the article are all negative, and must necessarily refer to some other code, whenever the excepted case shall occur. The ingenuity and the imposing appearance of this argument are freely acknowledged; but it will not, I think, bear a close examination. For, admitting the general law of licitation to have formed a part of the local law of France, it does not follow, that an ordinance restraining and qualifying that law in cases, and in relation to subjects purely maritime in their nature, should likewise form a part of the local law of that country. It would rather seem, that, on account of their maritime character, it was deemed proper to withdraw such subjects from the local, for the purpose of incorporating them into the general, marine code of the nation. That the 5th article is of this description has not been questioned. It was no doubt copied from the Roman maritime code, which, having also provided for cases of disputes between the owners of unequal interests, as well as between those having equal interests in one event only, it would seem as if the 6th article had been introduced for the purpose of perfecting the system, by affording a remedy in another event, for which the Roman law had made no provision. It is most obvious, in short, that Valin, as well as other jurists, who have treated of these articles, have considered them, not as parts of the common, but of the maritime law of France; and we find provisions similar to them in principle introduced into the commercial code of that country. That the Ordinances of Louis XIV. are not of binding authority upon the maritime Courts of other countries, I freely admit; but as affording evidence of the general maritime law of nations, they have been respected by the maritime Courts of all nations, and adopted by most, if not by all of them, on the continent of Europe. We are informed, that this code was compiled from the prevailing maritime regulations of France, and of other nations, as well as from the experience of the most respectable commercial men of France. And why should not such parts of it as are purely of a general maritime character, which are adapted to the commercial state of this country, and are not inconsistent with the municipal regulations by which our Courts are governed, be followed by the Courts of the United States in questions of a maritime nature? I leave this question to be answered by those, who would restrain the admiralty jurisdiction of the District Courts within the limits allowed by the Common Law Courts of England to be exercised by the High Court of Admiralty of that country. And why, let me again ask, shall the 6th article of this code be rejected in the case now under consideration? Neither justice nor policy requires it; for it is manifest that the appellants must either sur-

of Admiralty, and, indeed, is familiar in practice, in order to prevent irreparable mischiefs or impending

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render their property in this vessel, or rather the fruits of it, to the appellee, or their equal right to appoint the master, and to decide upon her destination, or that she must remain idle in port, until the subject in dispute is totally lost to both the owners. There is no other imaginable alternative, unless it be the one which the appellants ask for; for if the appellee may now legally claim the right to take this vessel to sea, and, by giving security for her safe return, may take to himself, in exclusion of the other part-owners, all the earnings of the voyage, his right to employ her, on the same terms, as long as she shall be in a condition to be navigated, will continue equally valid, and the exercise of it can no more be denied then, than now. Suppose, for the purpose of further illustrating this part of the subject, these parties had filed cross petitions, setting forth the difference between them, respecting the appointment of a master, and each praying to be permitted to take the vessel to sea under the usual stipulations; since neither could entitle himself to a preference, what could the Court do, but dismiss both petitions, and thus leave the vessel unemployed; unprofitable to both parties and to the interests of commerce, and subject to all the injury to which such a state of things would expose her? Yet this is substantially the present case; and if the Court has no power to decree a sale, it is clear that neither of the parties can take the vessel to sea, without a decree of the District Court authorizing him to do so. Upon the whole, considering the article of the French Code, which has so often been referred to, as constituting a part of the maritime law of nations; that it is in itself a wise and equitable provision; that it is not inconsistent with the commercial state of this country, or with any law which should govern this Court; I feel myself not only at liberty, but bound to adopt and apply it to the present case; and I shall, therefore, reverse the sentence of the District Court, and decree a sale of this vessel. My opinion, I acknowledge, was very different, when this cause was opened, from that which I now entertain. I had read that which was pronounced in the District Court by the learned Judge of that Court, with an entire conviction of its correctness. But the new evidence which has been introduced in this Court, presents, in at least one most essential particular, a different case from that which was submitted to the view of that Court." Brooks & Davis *v.* The Seneca, 18 Amer. Jurist (Jan. 1838), p. 486, 492 to 494. The decisions of the Courts of Common Law upon questions of Admiralty Jurisdiction ought, for many reasons, historically well known, to be received with great scruple and hesitation, especially when considering the times when these questions were principally agitated, during the hostile controversies between these Courts and the Court of Admiralty. Nor, indeed, considering the very slight means of knowledge then possessed by the Courts

losses.[1] Analogy, therefore, is clearly in its favor; and unless some limitation or exception can be asserted to exist, either in the origin, or constitution, or practice of the Court itself, it will not be a very satisfactory mode of disposing of the question, for a Court of Common Law to assert, upon its own mere *dictum*, without any reasoning in support of it, that the Court of Ad-

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of Common Law upon the doctrines of commercial and maritime jurisprudence, a system very little in consonance with the strict doctrines of the common law, is it at all a matter of wonder, that the decisions of these Courts upon this subject should have little in them to commend them for adoption in the present age, either in point of reasoning, or of principle, or of learning. How, indeed, it could be, that the Admiralty had undoubted jurisdiction in cases of disputes between part-owners themselves, and also between part-owners and the master, to dispossess one party and give possession to the other, thus acting *in rem*, in order to prevent irreparable mischief or ruin to the joint property; and yet, that it could not, to prevent the like mischief and ruin, direct a sale thereof, if it were the only adequate means to attain the end, is a matter of no small difficulty to understand. Nothing is more clear or more common in the exercise of jurisdiction by Courts of Admiralty, than to decree a sale of ships and of other property in their custody, to prevent loss, or decay, or ruin. Even Courts of Equity, although their jurisdiction rarely acts *in rem*, will direct a sale of property subjected to claims within their cognizance, in order to adjust rights, and to distribute proceeds, where otherwise irreparable mischief might ensue, or no other sufficient remedy exists. This is very common in cases of a dissolution of partnership, and in cases of charges upon land, and even sometimes in cases of pledges of personal property. See 2 Story on Eq. Jurisp. § 1024 to 1028; Id. § 1033. See also Stevens *v.* The Sandwich, 1 Peters, Adm. R. 233; De Lovio *v.* Boit, 2 Gallis. R. 398, 463; 3 Kent, Comm. Lect. 45, p. 153, 154, and notes, Ibid. As to the jurisdiction of Courts of Admiralty in cases between part-owners, see the Commissions to the Vice-Admiralty Courts in America (which in this respect are mere copies of the Commission of the High Court of Admiralty in England), cited in De Lovio *v.* Boit, 2 Gallis. R. 470, note; Curtis on Merchant Seamen, p. 348, note (3); Godolphin, Admr. Jurisd. ch. 4, p. 43; Sir Leoline Jenkins's Works, Argument in the House of Lords on the Admiralty Jurisdiction, vol. 1, p. 76, 80 to 84; Id. p. 792; 2 Brown, Civil and Adm. Law, p. 77, note (5); Id. p. 130 to 133.

[1] Ibid.

miralty has a right, in cases of disputes between part-owners of ships, to take a stipulation, but not to order a sale. Such language would seem more like an edict than a judgment, and to promulgate an arbitrary distinction, rather than a rational interpretation of the jurisdiction of another Court.

§ 440. Having thus considered the rights, duties, obligations, and liabilities of part-owners, as between themselves, in respect to the repairs, possession, and employment of the ship, and the authority of the majority to direct and control the same, let us now proceed to examine some other rights, duties, obligations, and liabilities, arising from the same relation, when all the part-owners act together, by common consent, for their mutual interest. In the first place, it may be convenient, here, to consider the rights and remedies, where one or more or all of the part-owners, by common consent, are employed in the general concerns of the ship, or of a part thereof, and expend moneys, or contract debts on account thereof. There can be no doubt, that, in such cases, all the part-owners are bound to contribute and pay their respective shares of such expenditures, and that all of them are liable *in solido* for the unpaid debts so properly incurred on the joint account.[1] But the question may arise, whether this is a mere personal charge, or whether the respective part-owners have also a lien on the ship itself for the expenditures, or charges, made by them, which lien is capable of being enforced against the ship itself, in cases of the insolvency,

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[1] Ante, § 419, 420; Abbott on Shipp. Pt. 1, ch. 3, § 8, p. 76, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 4, p. 811, 812, 2d edit.; 1 Montagu on Partn. B. 2, ch. 1.

death, or bankruptcy of a particular part-owner, or any other failure on his part to discharge his own share thereof.

§ 441. In cases of partnership, we have already seen[1] that the partners respectively have a specific lien upon the partnership property, for all expenditures made by them, and balances due to them for advances and other liabilities incurred on account of the partnership, as well as for their shares of the partnership effects, upon a dissolution of the partnership.[2] There is as little doubt, that part-owners of a ship, who purchase a cargo, and engage in a common voyage and adventure, upon the joint account and profit of all concerned (and not merely in an employment of the ship on freight), have also a like lien[3] for all disbursements and advances, as well as for their share of the profits, upon the property employed in such voyage or adventure, and its proceeds; for as to such voyage or adventure, they are treated as partners, and not merely as part-owners.[4]

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[1] Ante, § 326, 346, 347, 360, 361.

[2] Ante, § 326, 346, 347, 360, 361; Collyer on Partn. B. 5, ch. 4, § 1, p. 793, 794, 2d edit.

[3] [In Green v. Briggs, 6 Hare, 400, it was said that the use of the word "lien," in this connection, did not properly describe the right of a part-owner to be reimbursed out of the gross freight, the expenses incurred in the prior repairs and outfits of the ship.]

[4] Ante, § 54, 55, 56; Abbott on Shipp. Pt. 1, ch. 3, § 9, 10, p. 77, 78, 79, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 1, p. 794, 2d edit.; Holderness v. Shackels, 8 Barn. & Cresw. 612; 1 Montagu on Partn. B. 2, ch. 1. — In the case of Holderness v. Shackels (8 Barn. & Cresw. 612, 618), the very distinction was stated by Lord Tenterden, in delivering his opinion. "This is not the case of a claim of lien on the share of the ship, but a claim by persons, being part-owners of a ship, engaged together in an adventure; and the subject-matter, in respect of which this action is brought, is part of the proceeds of that adventure, viz., part of the oil, which had been obtained on a fishing voyage. Now, it is clearly

§ 442. But the question here propounded is intended to apply to the case of expenditures, advances, and debts, incurred on account of the ship, by the part-owners, merely in their character as such, as, for example, for repairs, or for outfits for a voyage, or by discharging existing liens thereon. Upon this question, different judicial opinions have been expressed by eminent judges in England and in America.[1] Lord Hardwicke, upon the most full and deliberate consideration, held, that where any part-owner died without paying his portion of the expenses of building and fitting out the ship, the other part-owners had a specific lien on his share in the ship, for the moneys which they had laid out, and the liabilities they had incurred on this account.[2] On the other hand, Lord Eldon, upon

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established, as a general principle of law, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership. The case of Smith *v.* De Silva (Cowp. R. 469), is a very entangled case, and the facts stated in the report are not very clear or perspicuous. It appears that De Silva had originally made advances, not as part-owner of the ship, nor even as partner in the adventure, but as a person appointed by all the part-owners to manage the adventure for them, rather as their agent than as their partner. He afterwards acquired an interest by purchasing a part of the ship, and so became a partner in the adventure; but he was not an original partner. Smith *v.* De Silva may, therefore, have been properly decided, without breaking in on the general principle to which I have adverted."

[1] Abbott on Shipp. Pt. 1, ch. 3, § 9, 10, p. 76 to 80, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 1, p. 793, 794, 2d edit.; 3 Kent, Comm. Lect. 43, p. 39, 4th edit.; 1 Montagu on Partn. B. 2, ch. 1, and Id. App. note (z).

[2] Doddington *v.* Hallett, 1 Ves. R. 497; Abbott on Shipp. by Shee, Pt. 1, ch. 3, § 5, p. 94, edit. 1840. [Affirmed in the late case of Green *v.* Briggs, 6 Hare, 395, where Vice-Chancellor Wigram observed: "The case of Doddington *v.* Hallett, was referred to in argument by the plaintiff's counsel, but only (as I understand) for the purpose of excluding the suggestion that the plaintiff relied upon it, or upon the doctrine it con-

great consideration, overruled this decision of Lord Hardwicke, and maintained that there was no lien

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tains, for supporting his claim in this suit. I collect from Story on Partnership, that upon principles of public policy and convenience, America has adopted Doddington *v.* Hallett. But, however that may be, it is certain that Lord Eldon, in Ex parte Harrison, and in Ex parte Young, deliberately overruled it. And the plaintiff was not wrong in reminding me at the outset, that what he seeks by this suit is, not to affect the ship or the proceeds of the sale of the ship, but only to have her gross earnings, or a sufficient part, applied in paying the expenses incurred in making them, before profits are divided amongst the part-owners. From this point I shall start by making three assumptions: first, by excluding the repairs of the hull of the ship; secondly, by supposing the ship's earnings to have consisted of a cargo of whale oil made upon a whaling voyage, and not to have arisen in the shape of freight; and, thirdly, by assuming that the voyage was simple and entire, and not affected by considerations which sometimes apply where an entire voyage out and home has, for some purposes, been considered as consisting of several voyages. After these assumptions I need not dwell long upon the point first contended for by the plaintiff. Holderness *v.* Shackels is a case in point. The Court distinguished between the ship itself, and her earnings; and held in that case, that although part-owners were tenants in common of the ship, they were jointly interested in the use and employment of the ship, and that the law as to earnings must follow the law in partnership cases. And in Ex parte Hill the Vice-Chancellor said: 'If there had been no sale the creditors would have had no lien on the ship, because that was not joint property; but the earnings of the ship would have been joint property, and liable to the joint creditors, not from any doctrine peculiar to the earnings of a ship, but on the general principle applicable to the joint property of every partnership.' If in this case the 'Thames' had been employed on a whaling voyage, and the money now at the bank represented the cargo, no dispute could have arisen. Then is freight, *quâ* earnings, distinguishable from other earnings of a ship, for the purpose under consideration? In the absence of authority establishing such a distinction, or a clear principle requiring me to adopt it, I will not admit it. The authorities, in fact, as far as they go, negative the distinction instead of supporting it. In Ex parte Young, in which Lord Eldon's mind was distinctly called to the difference between the ship and her earnings, he said, 'I have no doubt that freight is liable to the joint demand: as to the ship, it stands upon the nice distinction of a tenancy in common.' In Ex parte Hill, the earnings of the ship, with which the Court had to deal, was freight. In Ex parte Christie, Lord Eldon said, that what was coming from the master was joint earnings. The language

in such cases by the part-owners upon the shares of each other.[1]

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of Story on Partnership is not opposed to this conclusion. The learned author meant only to state what he considered clearly decided by authority, and not to say that freight might not be subject to the same law as other earnings of a ship. Does principle then require me to admit the distinction contended for, between freight and cargo, for a purpose like the present? Suppose a ship, by the consent of the owners, to be fitted for a voyage, and to make profit partly by freight, and partly by merchandise. Holderness *v.* Shackels furnishes the law in the one case. Upon what principle is the mode of adjusting the account between the part-owners to be split, with reference only to the nature of the earnings the ship has made? Am I bound to hold that each alteration in the employment of a ship, which accident or convenience may, from day to day, suggest, is to affect the rights of the part-owners *inter se*, as to the expenses necessary to prepare the ship for her employment? So here, in fact (though it forms no part of the argument on which I mean to rely), it does appear that the profits made were not exclusively from freight; that there was a cargo

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[1] Ex parte Young, 2 Ves. & Beam. R. 242; Ex parte Harrison, 2 Rose, R. 76. — Lord Tenterden (Abbott on Shipp. Pt. 1, ch. 3, § 10, p. 79, note (1), Amer. edit. 1829), in his earlier editions, stated his own doubts upon the doctrine of Lord Hardwicke, in language which was afterwards adopted by Lord Eldon, in Ex parte Young (2 Ves. & Beam. 242), and therefore it is here inserted, although omitted in the later editions. He said: "It seems to have been considered, that part-owners might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandise. But I do not find this point to have been ever decided; and there is a material difference between the two cases. Partners are at law joint-tenants of their merchandise; one may dispose of the whole property. But part-owners are tenants in common of a ship. One cannot sell the share of another. And if this general lien exists, it must prevail against a purchaser, even without notice; which does not seem consistent with the nature of the interest of a tenant in common. It is true, indeed, that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all that is due in respect to the part he holds in the ship, has been discharged. But as one part-owner cannot compel another to sell the ship, there does not appear to be any mode by which he can enforce against the other's share of the ship, in specie, the payment of his part of the expenses." See also 1 Montagu on Partn. B. 2, ch. 1, and Id. App. note (z). Why may not a lien be fairly presumed in such cases to be contemplated by the parties?

§ 443. It does not appear that any distinction was taken by Lord Eldon, in the application of the doc-

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of beer, or some article of export to a small amount, that entered into the transaction. If a distinction like that contended for, — a distinction which leads to manifest injustice, and in support of which nothing but what Lord Eldon in Young's case calls a 'nice distinction,' turning upon a tenancy in common, be not already established, I see no ground for it. The case of Helme v. Smith was referred to. In that case it was decided, that the managing owner may sue each shareholder for his proportion of the expenses before the adventure ends, which it was said in an ordinary partnership he could not do. Other cases to the same effect were cited. But there is no reason why that right should preclude the partner, who made an advance for his copartner for joint purposes, from insisting, where joint property comes to be divided, that in making the division, each partner, before he receives his proportion of profits, shall be charged with his due proportion of the expenses of making them. The observations of Mr. Justice Bosanquet, in Helme v. Smith, apply to that view of the case. Moreover, the objection would apply as strongly to Holderness v. Shackels as to any case. A form of expression found in numerous cases was next relied upon; namely, that 'freight follows the ownership in a ship, as an incident;' and Case v. Davidson, and other cases to the same effect were referred to. This law I do not doubt, but it is plain that those cases have no bearing upon the principal case. The question in those cases has been, who was the rightful party to receive such freight as was payable; and not whether the freight to be paid was gross or net freight, which is the only question here. Here there is no dispute that Briggs & Co. are entitled to such freight as is coming in respect of Acraman's share, and the only question is, whether the expenses of earning the freight are not, as between the part-owners, to be first paid in ascertaining what freight is coming. Excluding then the expense of the repairs of the ship, I hold that the plaintiff has a right to have the gross freight applied in paying the expenses of the refitting and outfit of the ship, before any division amongst the part-owners shall be made. The argument against the plaintiff's claim to have the expenses of repairs protected in the same way, was in substance this: that the repairs to the hull of the ship were inseparable from it; that they were, in effect, improvements of the chattel held in common, and must be governed by the same law which regulates the rights of the shareholders *inter se* respecting the ship itself. Now I will not deny, that a case may exist in which the question of repairs would necessarily be so dealt with. Nor will I say that any rule of logic would be violated by applying that reasoning to all cases of repairs. Nor, if I found authority supporting that reasoning in its application to repairs, do I say that my in-

trine, whether the party making the advances and expenditures was the ship's husband or not, or whether

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dividual opinion is so strong against it, that I should feel justified in opposing that opinion to any distinct authority. But that is not the question here. I am satisfied there is nothing, in point of authority, to prevent my holding that repairs necessarily and properly done, with a view to a particular adventure, — repairs without which the particular adventure could not be undertaken, should be governed by the same considerations which apply to such parts of the refitting and outfit as are inseparable from, and not part of the ship. And, if that be so, I cannot hesitate in preferring a conclusion which (without possible injury to any one) excludes the technical distinction upon which Lord Eldon overruled Doddington *v.* Hallett, and applies to this case the equitable rules by which the rights of partners *inter se* are regulated. I say without possible injury to any one, because, if, at the expiration of the adventure, the ship be of increased value, each tenant in common will, in that character, have the benefit of the improvement. The question, however, is whether, upon legal principles, this is the right conclusion. For the purpose of trying this I will first suppose, that the repairs are strictly necessary for the purposes of the adventure, and such as would be exhausted in the adventure. Why are the expenses of such repairs not to be treated as part of the capital employed by the adventurers on joint account? All expenditure for the purpose of, and necessary to the joint adventure, must, *primâ facie*, be taken to be the capital embarked in the adventure. The circumstance that the ship (held in common) is, during the adventure, improved in value, cannot by any logical rule alter the character of the expenditure which was made with a view to the adventure; and if that be admitted, the case is ended, for a partner who has not paid up his share of the capital, cannot entitle himself to a share of the profits, without giving credit for the share of capital which he ought to have supplied. It would not be difficult to suggest a case in which tenants in common of land, agreeing to be partners in farming it for experimental, as distinguished from ordinary agricultural purposes, and incurring extraordinary expenses in so doing, by which the land itself is improved during the partnership, would, as between each other, have a right similar to that which I hold to exist in this case. Would, then, the circumstance (if it existed), that the expenditure in repairs was not exhausted with the adventure, alter the case? If expenditure were necessary or proper for a specific purpose, why should this incidental consequence alter the case? I have already said, that no injury could possibly result to any party from it. The utmost consequence, however, would be the apportionment of the expenses of the repairs. In this case, the evidence is, that the repairs were necessary for the adventure. The ship, at the end of the voyage, was in fact broken up, and the defendant has made no case for apportionment. Where the reasoning upon which Lord

the ship's husband was a part-owner or not. The lien seems equally to have been denied by him in each case. The ship's husband, indeed, will be entitled, if a part-owner, to a lien for his disbursements and outfits upon the proceeds and profits of the voyage or adventure, undertaken upon joint account and for joint profit, as a sort of partnership for the voyage or adventure. And if the ship's husband be a mere stranger, and he has regularly come to the possession of the proceeds of the voyage, or of the ship itself, if sold, or of the ship's documents and freight, he will be entitled to a lien thereon for his reimbursement and indemnity. But beyond this, the ship's husband does not seem to be recognized as having any peculiar lien, or at least not any upon the ship or its proceeds.[1] There seems no little hardship in this strict doctrine; and it forms a marked contrast with that liberal policy, with which the Court of Admiralty, following out the precepts of the general maritime law, was accustomed to act, when allowed the free exercise of its own jurisdiction, by giving a lien on the ship for all supplies and expenditures thereon.[2]

Eldon overruled Doddington *v.* Hallett applies, it must be acted upon; where it does not, the principle upon which Doddington *v.* Hallett proceeded will, I conceive, be followed."]

[1] 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 1, p. 503 to 505, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 4, p. 810, 2d edit.; Abbott on Shipp. Pt. 1, ch. 3, § 8, 9, 10, p. 76, 77, 78, 5th edit.; Ex parte Young, 2 Rose, R. 78, note; s. c. 2 Ves. & Beam. 242.

[2] See on this subject the resolutions of the Privy Council of England of the 18th of February, 1632, assented to by all the Judges, expressly affirming the jurisdiction of the Admiralty, in the following terms: "If a suit be in the Court of Admiralty, for building, mending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm." Godolphin on the Admiralty Jurisdiction, p. 159; Zouch on Admiralty Jurisd. p. 122, 123; 2 Brown,

§ 444. In America, the same question has occurred, and the doctrine of Lord Hardwicke has been affirmed, as best founded in principle, and public policy, and convenience.[1] In short, cases of this sort are treated

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Civil and Adm. Law, p. 78, 79; Sir Leoline Jenkins's Works, Vol. 2, p. 76, 80 to 84, Argument on Admiralty Jurisdiction. See also 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 525, 526, 527, 5th edit.

[1] Mumford *v.* Nicoll (20 Johns. R. 611), overruling the decision in the same case in the Court of Chancery, 4 Johns. Ch. R. 522; Durham *v.* Jarvis, 8 Barbour, 94. The reasoning of Lord Hardwicke was to this effect: "No purchaser or assignee of any share of this ship is now before me, but merely the representative of Thomas Hall, who was part-owner with others in the trade of this ship; and his representative is just in the same case as he would be himself; and these general creditors are in the same case, having no assignment or specific lien on his share in the ship; and the rule of determination must be exactly the same as if Thomas Hall himself had been before the Court, and an account prayed against him. It must be admitted, the ship may be the subject of partnership, as well as any thing else; the use and earnings thereof being proper subject of trade, and the letting a ship to freight as much a trade as any other. Then it appears plainly to be a partnership among them, and the ship itself to be part of the subject thereof, which was to be let to freight to the company, it being their method of trading. The foundation of this partnership stock is the ship itself, which must be employed, and the earnings and profits to arise. Undoubtedly all these persons subject to this agreement, are liable in *solido* to the tradesmen who fitted it out; and this agreement for proportional shares is as between themselves; which is the case of all partnerships. But as to all persons furnishing goods or merchandise, or employed in work, each are liable in *solido*." The opinion of Lord Eldon is very brief, and almost without reasoning. He observed, in Ex parte Young (2 Ves. & Beam. R. 242), "The difficulty in this case arises upon the decision of Doddington *v.* Hallett, by Lord Hardwicke, which is directly in point. That case is questioned by Mr. Abbott, who doubts what would be done with it at this day; and I adopt that doubt. The case, which is given by Mr. Abbott, from the Register's Book, is a clear decision by Lord Hardwicke, that part-owners of a ship, being tenants in common, and not joint-tenants, have a right, notwithstanding, to consider that as a chattel used in partnership, and liable, as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship. His opinion went the length, that the tenant in common had a right to a sale. There is great difficulty upon that case; and the inclination of my judgment is against it. But it would be a very strong act for me, by an

as constituting a *quasi* partnership, with reference to the intended voyage or adventure, upon which the

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order in bankruptcy, from which there is no appeal, to reverse a decree made by Lord Hardwicke in a cause. From a manuscript note I know it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained; and there is no decision in equity contradicting that." In the note of Lord Eldon's judgment in 2 Rose, R. 78, note, the language attributed to him is: "Doddington *v.* Hallett, I know, from a MS. note, to have been Lord Hardwicke's deliberate judgment. In a case of joint property, I admit there cannot be much difficulty. It is different in a tenancy in common, and in an undivisible personal chattel. I certainly differ from Lord Hardwicke; but I hesitate to decide against his deliberate judgment in a cause upon a petition in bankruptcy. The better way will be, at present, to intimate my opinion to be against this lien, leaving the parties, if dissatisfied, to apply for a rehearing. I have no doubt, that freight is liable to the joint demands. As to the ship, it stands upon the nice distinction of a tenancy in common." In Mumford *v.* Nicoll (20 Johns. R. 611), Mr. Ch. Justice Spencer considered the subject very much at large, and his opinion was adopted by the Court of Errors. Upon that occasion he said: "The decree appealed from considers the appellant and Stilwell to have been owners as tenants in common, in equal moieties, of the brig Phœnix, and that they were special partners, and had a joint interest in the cargo and voyage; and that that partnership was one entire and distinct concern, unconnected with any former partnership, in any former voyage, in any other vessel; and it was decreed, that a master should state an account between the respondents, as assignees of Stilwell and the appellant, in respect to the brig Phœnix, and her cargo and voyage, and that the appellant be charged with a moiety of the net proceeds of the brig sold at Havana, and with a moiety of the net proceeds of the freight and cargo of the brig on the voyage, or so much, if any, of the net proceeds of the moiety of the freight and cargo, as shall appear due to the respondents, as such assignees, after deducting the balance, if any found due to the appellant from Stilwell, or an account to be taken and stated between them, in respect to their joint concern in the said freight, and cargo, and adventure, after all just allowances between them, in respect to such joint concern, are made. In other words, the decree considers the appellant and Stilwell as joint owners and partners, in regard to the cargo and freight, and directs the amount to be stated on that principle, confining that, however, to the particular voyage and concern of the brig Phœnix; and it considers them tenants in common of the vessel itself, and renders the appellant liable for the net proceeds of the sale of the brig, denying to the appellant a right to reimburse himself out of those proceeds, however the accounts between the appellant and Stilwell may stand, either as

ship is to be employed; and, therefore, the repairs, outfits, and other expenses incurred to accomplish the

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regards that voyage, or other concerns and voyages in other vessels. I put out of consideration, at once, the inquiry, whether the appellant knew of the assignment to the respondents, of Stilwell's interest in the brig, when he requested Captain Green to consign to him the proceeds of the brig and cargo, because there is no complaint of the sale of the brig, which was made in pursuance of instructions originally given, and which never were revoked; and because the appellant's right depends on legal principles, and not upon the circumstance that he has those proceeds in his possession. The question simply is, Has he a right to hold them subject to the inquiry into the general balance of his account, either in relation to that particular adventure, or in relation to other and similar adventures? In short, under the facts and circumstances of this case, are the proceeds of the vessel to be regarded as partnership property, either as regards the voyage of the Phœnix, or other and similar voyages in other vessels? I understand the Chancellor as admitting, that the case of Doddington *v.* Hallett (Ves. sen. 497), is directly opposed to the decision he has made, and that he considers that case as not only not having been acted upon, but as overruled by the cases to which he has referred. We will see what Lord Hardwicke decided in that case. The bill was founded on an agreement between the plaintiffs and one Hall, authorizing the latter to contract for the building of a ship, and for fitting out, managing, and victualling her, with an agreement to pay proportional shares, according to their interests. The part-owners claimed, against Hall's representatives, a specific lien, upon what was due to Hall for his share, on account of the money the plaintiffs had paid to the tradesmen, in fitting, &c. the ship, and that the administrators should not run away with it, as part of the general assets for all the creditors. Lord Hardwicke, after premising, that the case stood as though Hall himself was before the Court, no one having a specific lien on Hall's share in the ship, went on to say that it must be admitted, that a ship might be a subject of partnership, as well as any thing else, the use and earnings thereof being a proper subject of trade. He said, it was a partnership among them, and the ship itself to be part of the subject thereof, which was to be let to freight to the company, it being their method of trading. The foundation of this partnership stock was the ship itself, which must be employed, and the earnings and profits to arise. That, undoubtedly, all the persons subject to the agreement are liable in *solido* to the tradesmen who fitted it out, and the agreement for the proportional shares is as between themselves, which is the case of all partnerships. He said, if it had been agreed, that a brewhouse should be part of the partnership stock (which often happened), the case of the brewhouse being used in the partnership trade, if workmen do work in the brewhouse, every partner would be liable to that, and that brewhouse must be

enterprise, are deemed to be made on joint account, and intended to be governed, as to rights and liens, by the

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brought into the partnership account; and if more was due to one partner than another, all the shares of the partnership stock, consisting of the lease of the brewhouse, as well as the other effects, are liable to that account. He went on to observe, that if the share of one partner had been assigned, if it stood on the head of general equity, he should be of opinion, that if the purchaser had notice of the partnership, he would be subject to it; and he decreed for the plaintiffs. Lord Hardwicke perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint-tenancy, as between partners of the goods and stock in trade. He meant to decide, and did decide, that a subject, which ordinarily may be held as a tenancy in common, may, by the acts of the parties, become to be held in joint-tenancy. And the facts of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit her out, manage, and victual her, for the East India Company, formed, in his judgment, such a community of interest, as to constitute that a partnership transaction, in relation to those subjects; and thus a specific lien was acquired, by those who contributed more than their shares, against the share of the one who contributed less than his proportion. This case derives strong confirmation from the case of Smith *v.* De Silva and others (Cowp. R. 469), in which it was decided, upon an issue out of Chancery, that the interest of part-owners in a ship, and in the profits and loss of an adventure, undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the outfit. Lord Mansfield, in giving the opinion of the Court, held, that if the other partners had been obliged to discharge the amount of the notes, which remained unpaid at the time of the bankruptcy, the assignees must have allowed the other partners the full sum paid for the bankrupt, and would have come against them only for the balance due to him, if any. Mr. Abbott, in commenting upon this case, says, it seems to have been considered the part-owners of a ship might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandise. And in the third edition of his Treatise (p. 94), he says: 'It is true, indeed, that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all that is due, in respect to the part he holds in the ship, has been discharged.' And again, after citing the case of Doddington *v.* Hallett, without a word of disapprobation, in p. 96, he says: 'This usage, or course of trade, I apprehend to be, to charge the assignee or purchaser in account, for the outfit and other expenses incurred, in respect of the voyage, of which he is entitled, in consequence of his purchase, to share the profits, which can only be the voyage in prosecution at the time

rules of strict partnerships. After all, there would seem to be intrinsic equity in the doctrine maintained by Lord Hardwicke; and, as liens may arise, either from express or implied agreements, it is but a reasonable presumption (in the absence of all controlling circumstances), that part-owners do not intend to rely solely upon the personal responsibility of each other, to reim-

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of the purchase; but not to carry back the charge, as against him, to the expense of any antecedent adventure, from which he can derive no profit.' The cases cited by the Chancellor, and on which he has relied, to establish a contrary doctrine, do, undoubtedly, strongly impugn the authority of Doddington *v.* Hallett, though I must be allowed to say, that the case Ex parte Parry (5 Ves. jun. 575), is very distinguishable, and does not oppose Lord Hardwicke's opinion. It is, however, to be observed, that all the cases on which the decree is founded, are long since our revolution, and have no authoritative influence here. And I am not disposed to overrule Lord Hardwicke, supported, as I think he is, by Lord Mansfield, and the other Judges who sat with him, in a case in which justice and right require him to be supported. The statement of this case shows, that it is much stronger for the appellant, than the case before Lord Hardwicke. The vessel here was owned in equal shares, and was fitted out, or to be fitted out, on a circuitous trading voyage, at the joint expense of the parties. It was, therefore, a limited and special partnership, not only as to the cargo, freight, and the profits thereon, but as to the fitting out of the vessel. The appellant, after paying his proportion of mechanics' bills and ship-chandlery, under the assurance they had been paid by Stilwell, is called upon and compelled to pay them over again. The respondents are assignees for prior debts, and are chargeable with notice, or, at all events, have received the subject, liable to all equities between the appellant and Stilwell. Can it be just and equitable to deprive the appellant of his right to reimburse himself for the moneys he has been compelled to pay, as part-owner, for the default of Stilwell, in whose shoes the respondents stand? I answer, unhesitatingly, that it would be inequitable and unjust to do so. I must not be supposed to overrule the distinction between partners in goods and merchandise, and part-owners of a ship. The former are joint-tenants, and the latter are, generally speaking, tenants in common; and one cannot sell the share of the other. But I mean to say, that part-owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship; and if they are to be so regarded, the right of one to retain the proceeds, until he is paid what he has advanced beyond his proportion, is unquestionable."

burse themselves for expenses and charges, incurred upon the common property, for the common benefit; but that there is a mutual understanding, that they shall possess a lien *in rem.*

§ 445. We have already had occasion to state, that the majority in interest of the part-owners have a right to appoint the master and officers of the ship.[1] This right necessarily carries with it the right to displace and dispossess the master and other officers, when in authority or possession of the ship; and it will make no difference, in this respect, whether the master or other officer be a part-owner or not. However, when a Court of Admiralty is called upon to enforce this right, although it allows the authority to displace and dispossess, to be exercised at the sole pleasure of the majority, if the master or other officer is a mere stranger; yet if he is a part-owner, the Court commonly requires some reasonable ground to be stated therefor.[2]

§ 446. It often becomes a matter of important inquiry, to what extent the implied authority of one part-owner extends to bind the others in the concerns of the ship, when there is no real disagreement among them which affects their respective rights.[3] As to this, we have seen, that one part-owner may bind the others by his contract for repairs and materials and expenses of outfits by implication, when there is no known disagreement among them, and there is an acquiescence in what is done, or is doing.[4] But there are certain other authorities, which do not arise by implication of

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1 Ante, § 432.
2 The New Draper, 4 Rob. Adm. R. 287, 290, 291.
3 Ante, § 419.
4 Ante, § 419, 421; Davis *v.* Johnson, 4 Sim. R. 539.

law under ordinary circumstances; and, therefore, such authorities, whether exercised by a ship's husband, or by a mere part-owner, will not bind the other owners, unless there is either direct proof, or a strong presumption, that they have been positively conferred upon them. Thus, for example, neither the ship's husband, nor any part-owner, as such, has a right to insure the ship, or to borrow money, on account of the owners, or of other part-owners;[1] or to pledge their shares in the ship for the expenses of a law suit.[2]

§ 447. We have seen, in cases of partnership, that the dissolution thereof is not, under all circumstances, dependent upon the sole will of any one partner; but can, in some cases, be accomplished only by the decree of a Court of Equity.[3] The case is far otherwise with respect to part-owners, who are not compellable to maintain their connection with each other for any period; but each may terminate it at pleasure, by a sale of his own share, without the privity or consent of the others.[4] The connection may also be dissolved

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[1] French *v.* Backhouse, 5 Burr. R. 2727; Campbell *v.* Steen, 6 Dow, R. 134; Collyer on Partn. B. 5, ch. 4, § 4, p. 811, 812, 2d edit.; Abbott on Shipp. Pt. 1, ch. 3, § 8, p. 76, 77, 5th edit.; Hooper *v.* Lusby, 4 Camp. R. 66; Bell *v.* Humphries, 2 Stark. R. 345; 3 Kent, Comm. Lect. 45, p. 157, 4th edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 1, p. 503, 504, 5th edit.

[2] Ibid.

[3] Ante, § 275, 282 to 303.

[4] Collyer on Partn. B. 5, ch. 4, § 1, p. 796, 2d edit.; Id. § 4, p. 811; Molloy, de Jure Marit. B. 2, ch. 1, § 3; Abbott on Shipp. Pt. 1, ch. 1, § 3, p. 3; Id. ch. 3, § 7, p. 75, 5th edit. — Lord Tenterden, in his work on Shipping (Abbott on Shipp. Pt. 1, ch. 3, § 7, p. 75, 76, 5th edit.), has remarked upon the difference between the law of England and that of foreign maritime nations as to the right of sale. He says: "We have seen, that the Court of Admiralty cannot, in any case, compel any of the part-owners to sell his interest. The French Ordinance prohibits one part-owner of a ship from forcing his companion to a sale (which by the French laws one tenant in common might in general do), except in case of equal-

by the death or bankruptcy of any one part-owner; for then his share passes by operation of law to the representative or assignee of such part-owner. The absolute destruction of the ship, also, amounts to a complete dissolution thereof.

§ 448. Molloy has put some curious cases of the constructive ownership, as well as of the constructive destruction of a ship, which it may be well to state in his own words. "If a ship be broken up or taken in pieces, with an intent to convert the same to other uses; if afterwards, upon advice or change of mind, she be rebuilt with the same materials; yet this is now another, and not the same ship; especially if the keel be ript up or changed, and the whole ship be once all taken asunder and rebuilt, there determines the partnership, *quoad* the ship. But if a ship be ript up in parts, and taken asunder in parts, and repaired in parts, yet she remains still the same vessel, and not another; nay, though she hath been so often repaired, that there remains not one stick of the original fabric. If a man shall repair his ship with plank or other materials belonging to another, yet the ship maintains and keeps her first owners. But if a man take plank and materi-

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ity of opinions upon the undertaking of a voyage. But a part-owner may by our law dispose of his interest to another person at any time; a rule better adapted to the present state of commerce, than that which formerly prevailed among some of the nations of the continent, and which did not permit the sale of a ship until after a possession of three or more years; or at least not till after the performance of one voyage at the charge and risk of the part-owners. The old rule appears to have been framed with a view to the interest of the master, who in former times was a principal owner, and was the person, who, with the pecuniary assistance of the other owners, generally caused the ship to be built in the expectation of being employed in the command; an expectation that might be defeated, if the others could sell their shares to strangers, who, acquiring a majority of interest, might appoint a friend of their own."

als belonging to another, and prepared for the use of shipping, and with them build a ship, the property of the vessel follows the owners of the materials, and not the builder. But if a man cut down the trees of another, or takes timber or planks prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows not the owners, but the builders."[1]

§ 449. Part-owners being tenants in common, one or more of them cannot maintain any action at the common law against the others for detaining, or even for forcibly carrying away the ship;[2] but they may for the destruction of the ship; and, by parity of reasoning, probably for a sale of the entirety of the ship without their consent.[3] The right, also, to an account of all the earnings and profits of the ship by all the part-owners, is clear and indisputable. But at law, there is no small embarrassment in their proceeding to compel an account of the earnings and profits, which have been received by some of the part-owners, who refuse to render any account.[4] The ordinary remedy in cases of

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[1] Molloy, de Jure Marit. B. 2, ch. 1, § 6, 7.

[2] Molloy, de Jure Marit. B. 2, ch. 1, § 2; Abbott on Shipp. Pt. 1, ch. 3, § 4, p. 70, 71, 5th edit.; 3 Kent, Comm. Lect. 45, p. 157, 4th edit.; 1 Montague on Partn. B. 2, ch. 1; Barnardiston *v.* Chapman, cited 4 East, 121, 122, 123; Heath *v.* Hubbard, 4 East, R. 110; Litt. § 323; Co. Litt. 198 b, 200 a.

[3] Bloxham *v.* Hubbard, 5 East, R. 407, 421; Wilson *v.* Reed, 3 Johns. R. 175. — There is a strong intimation, in Heath *v.* Hubbard (4 East, R. 107), that the sale of the entire ship by one part-owner, is not such a destruction of the ship, as will entitle the others to maintain an action of trover against him. In the case of Wilson *v.* Reed (3 Johns. R. 175), the Court expressly held, that trover would lie by one tenant in common against another for a sale by the latter of the entirety of a chattel.

[4] Collyer on Partn. B. 5, ch. 4, § 4, p. 812, 813, 2d edit.; Abbott on Shipp. Pt. 1, ch. 3, § 12, p. 80, 81, 5th edit.; 1 Story on Eq. Jur. § 442 to 450.

this sort is by a bill in equity, to which, in general, all the owners should be made parties, either as plaintiffs or as defendants.[1] We say, the ordinary remedy, and to which, in general, all the parties should be made parties; because there may be cases, in which one of the part-owners, or the ship's husband, or any other agent may have entered into an agreement, by which he may bind himself to account with each of the part-owners severally, for his separate share of all proceeds and profits in his hands; and such an agreement, under such circumstances, may entitle each part-owner to maintain an action at law for such share; and if that should fail, or be found inadequate, it will entitle him to maintain a separate bill in equity for an account thereof, without making the other part-owners parties.[2]

§ 450. This duty to account for all the earnings and profits, is so manifestly a dictate of general justice, that it must naturally find a place in the jurisprudence of every civilized country. It is fully recognized in the Roman law.; and in the modern jurisprudence of continental Europe.[3] The Roman law applies to all cases of this sort the common rule of partnership. The Digest says: *Si Actor impensas*

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[1] Story on Eq. Jur. § 466; Collyer on Partn. B. 5, ch. 4, § 4, p. 812, 813, 2d edit.; Abbott on Shipp. Pt. 1, ch. 3, § 12, p. 81, 82, 5th edit.; Moffatt *v.* Farquharson, 2 Bro. Ch. R. 338; Story on Eq. Plead. § 166.

[2] Ouston *v.* Ogle, 13 East, R. 538; Abbott on Shipp. Pt. 1, ch. 3, § 12, p. 81, 82, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 4, p. 912, 2d edit. The case of Ouston *v.* Ogle, 13 East, R. 538, was a case, where a suit at law for a share of the net profits was brought, under an agreement of this sort, by one part-owner against the ship's husband, who was also a part-owner, and was successfully maintained. The case of Wilson *v.* Cutting (10 Bing. R. 436), and Servante *v.* James (10 Barn. & Cresw. 410), turned upon similar considerations.

[3] 1 Valin, Comm. Liv. 2, tit. 8, art. 5, p. 578, edit. 1766.

aliquas in rem communem fecit, sive socius ejus solus, aliquid ex ea re lucratus est, velut operas servi, mercedesve; hoc judicio eorum omnium ratio habetur. Sive autem locando fundum communem, sive colendo, de fundo communi, quid socius consecutus sit, communi dividundo judicio tenebitur.[1] Again the Code says: *Item eorum etiam, quæ vobis permanent communia, fieri divisionem providebit; tum sumptuum (si quis de vobis in res communes fecit), quam fructuum.*[2] The reason given is: *Ut in omnibus æquabilitas servetur.*[3]

§ 451. The Roman law, indeed, seems to have gone a step further than, perhaps, has as yet been distinctly recognized at the common law, and that is, by giving a complete remedy, in taking an account and making an allowance for all losses occasioned by the fraud or negligence of one part-owner, to the others, in the management of the common property. *Item, doli et culpæ (cum in communi dividendo judicio hæc omnia venire non ambigatur) rationem, ut in omnibus æquabilitas servetur, habiturus.*[4] And again: *Venit in communi dividendo judicium, etiam si quis rem communem deteriorem fecerit; forte servum vulnerando, aut animum ejus corrumpendo, aut arbores ex fundo excidendo.*[5] Probably our Courts of Equity would, in many cases, act upon the same just and enlarged policy; but it would not be easy to point out many instances of its actual exercise and application in practice.

§ 452. Pothier has enumerated, in a general way,

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[1] Dig. Lib. 10, tit. 3, l. 11; Id. l. 6, § 2.

[2] Cod. Lib. 3, tit. 37, l. 4.

[3] Ibid.

[4] Ibid.

[5] Dig. Lib. 10, tit. 3; l. 8, § 2; Pothier, de Société, n. 190.

some of the duties and obligations which part-owners owe to each other. Among others, he enumerates the duty of each part-owner to pay his share of the debts and charges contracted for the common concern;[1] to account with the other part-owners for their shares of the common earnings and profits in his hands; and to pay the debts due by him to them, as well as the damages sustained by them by his acts or negligences.[2] Some of these duties and obligations are so obvious, and so analogous to the like duties and obligations between partners, that it does not seem to be of any importance to dwell upon them, or even to enumerate them in detail. But here, again, we must not assume, as a matter of course, that any one or more of the part-owners is entitled, at the common law, to a compensation for losses, sustained by the negligence or misconduct of the others in the management of the common property, where no special agency has been assumed, simply because the Roman law or the French law would seem, in the like cases, to justify it;[3] for the common law authorities have not as yet recognized any such general doctrine; and some of them may, perhaps, be thought to point to a different conclusion.[4]

§ 453. We may conclude this head with the consideration of the question, how far part-owners are bound by the statements or admissions of each other, where neither of them is the common agent of the ship, or the separate agent of any one part-owner of the ship. We have already seen, that the statements

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[1] Pothier, de Societé, n. 187, 188, 189, 191, 192.

[2] Pothier, de Societé, n. 189, 190.

[3] Pothier, de Societé, n. 190.

[4] Ante, § 450, 451.

and admissions of one partner, during the continuance of the partnership, will bind the others as evidence, according to the common law.[1] But the same doctrine has never been applied to the case of part-owners.[2] The reason sometimes assigned for this distinction is, that, in case of a partnership, every man knows who his partner is. But when one part-owner sells his share, the remaining part-owners, not being privy to the instrument, by which the new part-owner is created, may be entirely ignorant of the fact, who the person is, who has thus become a part-owner with them.[3] But the truer and broader ground is, that there is no community of interests, or of rights, or of authorities between part-owners; and they are not, as in cases of partnership, agents of each other in the concerns of the ship, unless some special authority is expressly or impliedly delegated to them for the purpose. Part-owners are not, therefore, bound by the acts of each other, unless those acts are specially authorized; and, hence, it follows, *à fortiori*, that the mere admissions of one, without any such authority, ought not to bind the others. Even an act of one part-owner, which will ordinarily make the ship liable to condemnation, if done with the privity of the other owners, will not produce any such effect, except as to his own share, when it is done without such privity; for that implies coöperation and consent.[4]

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[1] Ante, § 450.

[2] Collyer on Partn. B. 4, ch. 4, § 5, p. 819, 820, 2d edit.; Jaggers *v.* Binnings, 1 Stark. R. 64.

[3] Mr. Justice Bailey in Wilson *v.* Dickson, 2 Barn. & Ald. 2, 12, 13.

[4] The Jonge Tobias, 1 Rob. R. 329; Collyer on Partn. B. 5, ch. 4, § 5, p. 820, 2d edit.; 2 Wheat. R. Appendix, 37, 38, 39, 40.

§ 454. Let us in the next place proceed to the consideration of the rights and remedies of part-owners of ships against third persons. These may arise, either from contracts made with such persons, or from torts committed by them upon the common property. In respect to both, all the part-owners constitute in point of law but one owner;[1] and, therefore, all contracts made by them, either personally, or through the instrumentality of an agent, or ship's husband, with third persons, are treated as entire joint contracts; and the remedy for any breach thereof must be in the name of all the part-owners against the other contracting party. If the name of any one be omitted, it is ordinarily, upon the technical rules of pleading at the common law, fatal to the maintenance of the suit; for by those rules all the contracting parties, who are plaintiffs, are positively required to join in the suit.[2]

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 13, p. 81, 5th edit.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 14, p. 82, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 6, p. 820, 821, 822, 2d edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 519, 520, 5th edit.; Skinner *v.* Stocks, 4 Barn. & Ald. 436, 437; 1 Chitty on Plead. p. 6, 7, 8, 3d edit.; Baker *v.* Jewell, 6 Mass. R. 460; Collyer on Partn. B. 3, ch. 5, § 1, p. 461, 462, 2d edit.; 1 Montagu on Partn. B. 2, ch. 1. — There may, perhaps, be an exception where one part-owner has received his own share of the money due on the contract, or has released his claim to it. At least, Lord Tenterden, in his work on Shipping, puts the case as open for consideration at the common law. There is, however, some reason to doubt, whether in such a case the remedy of the other part-owners is not exclusively in equity. Lord Tenterden has stated the whole doctrine in the following terms: "In the case, however, of an action for the freight of goods conveyed in a general ship, all the part-owners ought to join, or if they do not, the defendant may avail himself of the objection by evidence at the trial, and without plea in abatement, according to the general rule of law and the distinction between contracts and wrongs; unless, perhaps, some one should have received his own share, or have released his claim to it. The necessity of all the part-owners joining as plaintiffs in the suit, in this case, is founded

In cases of tort, a more mitigated doctrine prevails; for while all the part-owners are at the common law required in strictness to join in every suit for any tort, committed against the common property, nevertheless, the omission to join any one or more of them can be taken advantage of only in a preliminary stage of the suit by a plea in abatement; and if no such plea is filed in the cause, it is a waiver of the objection, and will not affect the rights of the plaintiffs upon a trial of the merits.[1] It is not, perhaps, very easy to establish

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upon the consideration, that all of them are partners with respect to the concerns of the ship; and upon this consideration, the present Lord Chancellor (Eldon), in a case of bankruptcy, wherein it appeared that the owners of a ship, upon a settlement of accounts with the master, who had become a bankrupt, were indebted to him, and that, on the other hand he also was indebted to some of them severally upon separate and distinct concerns, refused to allow the latter to set off their respective demands against the claim of his assignees for their shares of the general debt." Abbott on Shipp. Pt. 1, ch. 3, § 14, p. 82, 5th edit.; Ex parte Christie, 10 Ves. 105; Collyer on Partn. B. 5, ch. 4, § 6, p. 821, 822.

[1] Abbott on Shipp. Pt. 1, ch. 3, § 13, p. 81, 5th edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 519, 520, 5th edit.; Sands *v.* Child, Salk. 32; Addison *v.* Overend, 6 Term R. 76; Sedgworth *v.* Overend, 7 Term R. 279; Rice *v.* Shute, 5 Burr. R. 2611; Eccleston & Wife *v.* Clipsham, 1 Saund. R. 153, and Serg. Williams's note (1), Id. p. 154; Baker *v.* Jewell, 6 Mass. R. 460; Hart *v.* Fitzgerald, 2 Mass. R. 569; Converse *v.* Sims, 10 Mass. R. 377; Thompson *v.* Hoskins, 11 Mass. R. 419; Molloy, de Jure Marit. B. 2, ch. 1, § 2; Collyer on Partn. B. 5, ch. 4, § 6, p. 820, 821, 822, 2d edit.; Heath *v.* Hubbard, 4 East, R. 122; Bloxam *v.* Hubbard, 5 East, R. 407; Depeyster *v.* Wheelwright, 1 Johns. R. 471, 486; Brotherson *v.* Hodges, 6 Johns. R. 108.—Upon this point Lord Tenterden, in his work on Shipping, has given the reasoning, on which the general rule is founded in cases of tort. The several part-owners of a ship make in law but one owner; and in case of any injury done to their ship by the wrong or negligence of a stranger, they ought regularly to join in one action at law for the recovery of damages, which are afterwards to be divided among themselves according to their respective interests; for otherwise the party, who had committed the wrong, might be unnecessarily harassed with the expense of several suits to obtain the same end, which might be as well effected in one. But this rule

the soundness of this distinction upon any general reasoning. It seems, however, to proceed upon this ground, that, in cases of tort, the tort is treated as joint and several; whereas in cases of contract, the contract is treated as an entirety, and as being incapable of separation as to the plaintiffs. And yet a different rule prevails, even in cases of contract, as to the parties who are defendants in the suit; for in the latter cases, the objection of the nonjoinder of all the proper contracting parties to the contract as defendants can be taken advantage of (as in the case of torts), by a plea in abatement only, and not upon the trial of the merits.[1]

§ 455. In the next place, as to the rights and remedies by third persons against part-owners of ships. These properly are divisible into those arising from contract, or those arising from tort. In cases of con-

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of law is made for the ease of the wrong-doer; and, therefore, the law requires, that he should avail himself of it at the very beginning of the cause, by pleading in abatement of a suit brought by one part-owner, that there are others living, who ought to be parties to it. For if the defendant does not do this, the single part-owner will recover damages for the injury proportionate to his share in the ship, whether the nature of his interest is made to appear upon evidence at the trial, or is originally stated by himself in the allegation of his cause of complaint. And if afterwards another part-owner sues for his own interest, the defendant can no longer avail himself of the objection, because the party to the first suit has no longer any matter of complaint. In the case of the death of any part-owner after an injury received, the right of action survives in general to the surviving part-owners, who must afterwards pay to the personal representatives of the deceased the value of his share." Abbott on Shipp. Pt. 1, ch. 3, § 13, p. 81, 82, 5th edit.

[1] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 82, 83, 5th edit.; 1 Montagu on Partn. B. 2, ch. 1; Rice *v.* Shute, 5 Burr. R. 2611; Serg. Williams's note (1) to Eccleston & Wife *v.* Clipsham, 1 Saund. R. 153, 154; Collyer on Partn. B. 5, ch. 4, § 6, p. 822, 2d edit.; Id. B. 3, ch. 5, § 2, p. 496, 497; Id. § 5, p. 513; Wright *v.* Hunter, 1 East, R. 20.

tract, by the common law, all the part-owners are liable *in solido* to the other contracting party for the entirety of the debt or obligation, whether the contract be directly made by one or more of the part-owners with the consent of all, or be made through the instrumentality of the master of the ship, or of the ship's husband, or of any other agent.[1] There is an exception, indeed, which stands entirely in harmony with the general rule; and that is, where an exclusive credit is knowingly and intentionally given to one or more of the part-owners, or to the master, or the ship's husband, or any other agent; for in such cases, as it is competent for the creditor to give such an exclusive credit, he thereby exonerates all the other parties.[2] What circumstances will, or will not, amount to giving such an exclusive credit, must, of course, depend upon the evidence in each particular case, and can admit of no universal exposition.[3] But it may be generally stated, that merely receiving payment from one part-owner for his share, or charging the master, or ship's husband, or other agent, with the debt, will not, of itself, amount to giving an exclusive credit to them,

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 83, 84, 5th edit.; 3 Kent, Comm. Lect. 45, p. 155, 156, 4th edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 520, 529, 537, 5th edit.; Collyer on Partn. B. 5, ch. 4, § 6, p. 817, 818, 2d edit.; Rich *v.* Coe, Cowp. R. 636; Bladney *v.* Ritchie, 1 Stark. R. 338; Westerdell *v.* Dale, 7 Term R. 306; 1 Montagu on Partn. B. 2, ch. 1.

[2] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 82, 83, 84, 5th edit.; Story on Agency, § 288 to 300; Chapman *v.* Durant, 10 Mass. R. 47; Schermerhorn *v.* Loines, 7 Johns. R. 311; Murdon *v.* Whitlock, 1 Cowen, R. 290; Cox *v.* Reid, 1 Carr. & Payne, R. 602; Reid *v.* White, 5 Esp. R. 122; Wyatt *v.* Marquis of Hertford, 3 East, R. 147; Ex parte Bland, 2 Rose, R. 91; Collyer on Partn. B. 5, ch. 4, § 5, p. 817, 2d edit.

[3] Story on Agency, § 288 to 291; Id. § 293, 294, 296, 297, 298.

which will discharge the owners.[1] *A fortiori*, it will not, where none of the owners are known, or it is not known that there are other part-owners; for, under such circumstances, there is no pretence to say, that any exclusive credit is intended to be given, since there is no knowledge, or act, from which an election to give an exclusive credit can be inferred.[2] We have already had occasion to state, that ordinarily all the part-owners should be joined in a suit brought on a joint contract by the creditor against them; but that if not joined, the objection is not fatal at the trial upon the merits; but was pleadable only in abatement.

§ 456. The French law does not agree with the common law in making part-owners liable *in solido* for all the debts contracted upon account of the ship, or other common property, even when the contract is made by all, or in the name of all, of them. But it restricts the liability of each part-owner to the payment of his own share or proportion thereof, unless all expressly agree to be bound *in solido*.[3] In this

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[1] Teed *v.* Bearing, cited Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 83, 84, 5th edit.; Ex parte Bland, 2 Rose, R. 91; Stewart *v.* Hall, 2 Dow. R. 29; James *v.* Bixby, 11 Mass. R. 34; Leonard *v.* Harrington, 15 Johns. R. 298; Marquand *v.* Webb, 16 Johns. R. 89; Story on Agency, § 288, 294 to 299; Collyer on Partn. B. 5, ch. 4, § 5, p. 817, 818, 2d edit.; Thompson *v.* Finder, 4 Carr. & Payne, R. 158.

[2] Story on Agency, § 290, 291, and note (2), Ibid.; Thompson *v.* Davenport, 9 Barn. & Cresw. 78; Paley on Agency, by Lloyd, p. 245 to 250; Paterson *v.* Gandesaqui, 15 East, R. 62.

[3] Pothier, de Societé, n. 187; Emerigon, Traité des Assur. Tom. 2, ch. 4, § 11, p. 456, edit. 1783. — The law of Louisiana is the same as the law of France on this subject. David *v.* Eloi, 4 Miller, Louis. R. 106; 3 Kent, Comm. Lect. 45, p. 156, 4th edit.; Civil Code of Louisiana (1825), art. 2796. Mr. Justice Porter, in delivering the opinion of the Court in David *v.* Eloi (4 Miller, Louis. R. 106), referring to the case of Kimball *v.* Blanc, said: "In the opinion delivered in that case, the Court took occa-

respect it differs from its own rule in cases of commercial partnerships; for there all the partners are liable

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sion to say, that as to the law previous to the adoption of the Louisiana Code we were not left in doubt, since the decision in the suit of Carrol *v.* Waters. It was there settled, that joint owners of steamboats were only responsible for their virile share. That case was decided on the definition given in the Code of Louisiana of a particular partnership, and it is so expressly stated in the opinion. The majority of the Court being unable then, as they are now, to distinguish between the joint owners of a steamboat, and the joint owners of a house or of a plantation. It is an association, which relates to a specified thing, and to the use to be derived therefrom. Civil Code, 390, art. 12. The correctness of the construction was supposed to be forfeited by a reference to the rules prevailing in the greater number of commercial countries in relation to the responsibility of joint-owners. And so it appears to be. For after all that has been said in the argument of this cause, it is quite clear they are not responsible *in solido*, as they were in the Roman law. By the statutes of the majority of the commercial nations of Europe, owners of vessels are discharged from all responsibility by surrendering their interest in them. This Court does not profess to understand, how the part-owner of a ship, who can free himself from responsibility for a debt, which may be ten times as great as his share in the vessel, by abandoning that share to the creditor, can be considered as personally responsible *in solido* for the whole debt. It thinks with Emerigon, that his obligation is more real than personal; and that it depends on the amount of interest he has in the vessel, not on an obligation *in solido* as joint owner, whether he is bound for the whole amount of a debt contracted by the master. Emerigon, Traité des Assurances, vol, 2, p. 454. It remains to consider, whether a change has been made in the law, as it stood previous to the adoption of the late amendments to our Code. By the 2796th article of the Louisiana Code, it is provided, that an association for the purpose of carrying personal property for hire in ships and other vessels, is a commercial partnership. In the case of Kimball *v.* Blanc, we decided that the bare circumstance of persons being joint owners of a boat did not make them responsible *in solido;* and this is still the opinion of the Court, because men may become joint owners of a boat for other purposes than carrying personal property for hire. She may be bought on speculation with an intention of selling her again. She may, as was said in the opinion delivered in the case of Kimball *v.* Blanc, be chartered out, and while she remains joint property never be used to carry goods. In these and other cases, which may be supposed, there is no association for transporting personal property for hire. From the argument in this case, we suppose it has been understood, that the Court, in the case alluded to, settled the principle, that joint-owners, who used the boat in carrying the goods for hire, were not responsible *in solido.* The general reason-

in solido.[1] And where the contract is entered into by one part-owner alone on account of the ship, as for example, for supplies or outfits or repairs, that part-owner is solely responsible to the creditors for the whole amount of the debt; but he has his remedy over against the other part-owners for contribution.[2] In short, in such a case, the creditor is deemed to give an exclusive credit to the contracting part-owner. By the law of Holland, the several part-owners are in all cases chargeable only according to their respective interests in the ship.[3]

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ing in that opinion, which went further than was necessary for a decision of the case, may have furnished some grounds for that belief; but nothing was further from our intention; so far from it, a contrary intimation was thrown out. It was there said: 'Owners would perhaps be bound *in solido*, if they held themselves out to the community as partners in the carrying trade; but the bare circumstance of their being joint owners cannot have that effect.'"

[1] Pothier, de Societé, n. 187; Ante, § 102, 103, 109.

[2] Pothier, de Societé, n. 187; Ante, § 420.

[3] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 84, 5th edit.; Vinn. ad Peckium, p. 155, note (a), tit. De Exercit. Act. edit. 1647; Van Leeuwen, Comm. on Roman-Dutch Law, B. 4, ch. 2, § 9.—Van Leeuwen, in his Commentaries, says: "A creditor, who had transactions with any one, to whom a ship was trusted by an owner, or who was placed by his master as factor or manager of any merchandise concerning the ship, or such merchandises alone, such creditor anciently had the option, whether he would call upon the owner of the ship, or his substitute, the merchant, or his manager, for payment, and prosecute them at law; and if there were several owners or merchants, in that case each of them was bound for the whole. But this usage has not been adopted among us, it being prejudicial to trade; and one is obliged always to call upon the owners, or the merchants themselves, and sue them at law. Neither is it in use in Holland (where trade is at present, and has for a long time since been prosperous), viz. that where there are many owners and partners, each shall be bound for the whole. But, on the contrary, it was introduced, that many joint owners of a ship together may not be called upon for payment further than for the value of the ship, and the amount of the property which she contains; and each is bound separately, and no further than for his respective share in the trade; and it is sufficient if they deliver and bring up, what they have in common, in satisfaction of the de-

§ 457. The Roman law promulgates a similar doctrine, where the contract is made by all the part-owners personally; that is to say, that they are not liable *in solido;* but each is liable only for his own share and proportion of the debt, according to his interest in the ship. On the other hand, where one part-owner only makes the contract, he alone is held responsible to the creditor for the whole debt. But where the contract is made by the master, appointed by them, there all the

cree for the whole; and so it was decreed in the High Court of Holland." Van Leeuwen's Comm. B. 4, ch. 2, § 9, English Translation, London, 1820, p. 320. Vinnius, in his Commentaries on Peckius, De Exercit. Actione (Lex. 4), p. 155, edit. 1647, says: "Si plures sint, qui navem exerceant, placet singulos ex contractu magistri in solidum teneri; idque hac ratione, ne in plures adversarios distringatur, qui cum uno contraxit. (l. 1, par. ult. et l. 2, hoc tit. fac. l. et ancillarum, 27, § ult. inf. de pecul.) Quippe actio exercitoria, qua tenentur exercitores, ex solius magistri persona et facto nascitur; utpote cum quo solo, non cum ipsis exercitoribus, contractum est. Cum igitur in plures dividenda non sit obligatio, quæ in unius persona originem habet, ne in plures distringatur, qui cum uno contraxit, ex eo satis intelligimus beneficio divisionis hoc casu locum non esse. (Bald. in rubr. C. eod. in fin.). Idem est, si contractum sit cum plurium institore. (l. habebat. 13, par. ult. et l. seq. inf. de instit. act.) aut cum servo plurium voluntate dominorum navem exercente. (l. 6, par 1, inf. hoc tit.) Cæterum hoc jus apud Hollandos receptum non est, apud quos singuli exercitores, pro sua duntaxat parte exercitionis conveniri possunt. Neque enim ut singuli in solidum teneantur, visum est aut naturali æquitati convenire, quæ satis habet, si pro suis singuli portionibus conveniantur; neque publice utile esse, propterea quod deterrentur homines ab exercendis navibus, si metuant, ne ex facto magistri quasi in infinitum teneantur. Quin et hoc constitutum, ne exercitoria etiam universi amplius teneantur, quam ad æstimationem navis et eorum, quæ in navi sunt, teste Grotio, lib. 3, introduct. ad jurisp. Bat. c. 1, et lib. 2, de jur. bell. et pac. c. 11, n. 13. Cæterum Hevia, p. 2, Cur. Phil. lib. 3, c. 4, n. 22, simpliciter sequitur dispositionem juris communis." See also the Commentaries of Peckius upon the same title and law of the Digest; from which, perhaps, it may be inferred, that principles similar to those of the Roman law pervade the jurisprudence of many of the continental nations. The Scottish law is certainly so. See 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 519, 520, 537, 538, 5th edit.; Erskine, Inst. B. 3, tit. 3, § 45.

part-owners are liable *in solido*.[1] Thus, it is said by Ulpian in the Digest: *Si tamen plures per se navem exerceant, pro portionibus exercitationis conveniuntur. Neque enim invicem sui magistri videntur. Sed, si plures exerceant, unum autem de numero suo magistrum fecerint, hujus nomine in solidum poterunt conveniri. Sed si servus plurium navem exerceat voluntate eorum, idem placuit, quod in pluribus exercitoribus. Plane si unius ex omni voluntate exercuit, in solidum ille tenebitur. Et ideo puto in isto, et superiore casu, in solidum omnes teneri*.[2]

§ 458. In the next place, as to the rights and remedies of third persons against part-owners of ships for torts committed by them personally, or by the improper conduct or negligence of their agents in the management of the joint property. They are, without question, all responsible at the common law, severally, as well as jointly, *in solido*, for all torts personally committed or authorized by them, or occasioned to third persons by the negligence of one or more, or all of them, or by that of the master of the ship, or ship's husband, or other agent thereof; but not for the wilful or malicious acts of the latter.[3] The reason for this distinction between negligent and wilful or malicious acts is, that neither the master nor ship's husband, nor other agent, in doing such wilful or malicious acts, can properly be deemed to be acting within the scope

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[1] Abbott on Shipp. Pt. 1, ch. 3, § 15, p. 84, 5th edit.; 1 Bell, Comm. B. 3, Pt. 1, ch. 4, § 5, p. 519 to 525, 5th edit.

[2] Dig. Lib. 14, tit. 1, l. 4, § 1, 2; Id. l. 1, § 24, 25; Pothier, Pand. Lib. 14, tit. 1, n. 4, 10, 13.

[3] Story on Agency, § 308 to 313; Id. § 452 to 457; Ante, § 167, 168; 1 Montagu on Partn. B. 2, ch. 1; Low *v.* Mumford, 14 Johns. R. 426; Patten *v.* Gurney, 17 Mass. R. 182.—Hence the suit may be commenced against all of them, or against any one or more of them. Ibid.

of the authority confided to him by the owners, in the management of the ship or its concerns; but cases of negligence may, and ordinarily do arise, in the very course of such management.[1] The doctrine is clearly illustrated in the common case of a collision or running down of ships on the high seas, or in port, whereby damage or loss is incurred. If the tort be by the wilful or malicious act or design of the master, or any other officer or agent of the ship, the owners are not liable therefor; but the party only, who commits the tort. But if it be by the negligence of the master, or any other officer or agent, then the owners are liable therefor *in solido*, jointly and severally. On the other hand, if a tort be committed by one part-owner of the ship, who is not employed by the others about the concerns of the ship, or authorized to act for them, but he is acting solely, *suo jure*, as part-owner, the other part-owners will not ordinarily be liable therefor, whether the act be wilful or malicious, or merely negligent, for the very reason that he is not intrusted by them with the management or concerns of the ship.[2]

§ 459. The Roman law, in like manner, in many cases, made the principal liable for the torts and negligences of his agents and servants.[3] It has been supposed, that the Roman law never was in this respect as extensive in its reach as our law; in other words, that it never did create a general liability of principals for the wrongs and negligences of their agents, but limited it to particular classes of cases; and that the

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[1] Story on Agency, § 308 to 313; Id. § 452 to 457.

[2] Collyer on Partn. B. 5, ch. 4, § 5, p. 820, 2d edit.; Story on Agency, § 452 to 474.

[3] Story on Agency, § 318.

liability of principals, so far as it is recognized in that law, was mainly dependent upon the Prætor's edict; and was not worked out of the original materials of the Roman jurisprudence. Whether this supposition be correct, or not, it is certain, that in certain classes of cases, the Prætor, by his edict, either introduced a new and more rigid liability, or he gave to that, which previously existed, an additional force, and, in some respects, a more onerous obligation. Thus, masters and employers of ships, innkeepers, and stable-keepers, were made responsible for the safety and due delivery of the goods committed to their charge; and of course, if the loss or damage were occasioned by the negligence or wrong of their servants, and not by themselves, their responsibility was not varied.[1] *Ait Prætor; Nautæ,*

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[1] Story on Agency, § 318; Story on Bailm. § 464, 465; Dig. Lib. 4, tit. 9, l. 1, § 3; Heinec. Pand. Lib. 4, tit. 8, § 546, 547, 548; Pothier, Pand. Lib. 4, tit. 9, n. 1, 2, 8; 1 Domat, B. 1, tit. 16, § 1, art. 3, 5; Id. § 2, art. 2; Id. § 3, art. 1. — Lord Stair, in his Institutes (B. 1, tit. 13, § 3), seems manifestly to have considered this edict as introducing, for the first time, the liability of principals for the acts and defaults of their agents, and of making that liability more rigid, in many cases, upon the ground of public policy. His language is: "In the civil law there is a depositation of a special nature, introduced by the edict, Nautæ caupones stabularii, 'quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.' By this edict, positive law for utility's sake hath appointed that the custody of the goods of passengers in ships, or strangers in inns, or in stables, shall be far extended beyond the nature of depositation, which obliges only for fraud, or *supine* negligence, them, who have expressly contracted for their own fact. But this edict, for public utility's sake, extends it; first to the restitution of the goods of passengers and voyagers, and reparation of any loss or injury done by the mariners, or servants of the inn or stable. Whereas, by the common law, before that edict, in this and such other cases, there was no such obligement; much less are persons now obliged for their hired servant's fact or fault, except facts, wherein they are specially intrusted by them. But, because the theft and loss of goods is very ordinary in ships, inns, and stables, therefore this edict was introduced for the security of travellers. Secondly, the edict extends this obligement, even to the damage sustained

Caupones, Stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.[1] The reason assigned is, that the rule is well founded in public policy and convenience, and is the only means to prevent losses by fraud or connivance.[2] *A fortiori*, if the act was done with the consent of the principal, he was liable. *Si ipse alicui e nautis committi jussit, sine dubio debeat obligari.*[3]

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by (the act of) other passengers or strangers in the ship, inn, or stable, for the which, the master of the ship, innkeeper, or keeper of the stable, could be no ways obliged, but by virtue of this edict. Thirdly, they were made liable for the loss or theft of such things absolutely, from which they were free by no diligence, but were not liable for accident or force; that is, sea-hazard must always be excepted." See, also, 1 Bell, Comm. § 398, 399, 400, 401, 402, 4th edit. See Story on Bailm. § 400, 401, 402, 458, 464, 465, 466. There are certainly passages in the Digest, which make principals responsible for the faults and negligence of their agents, and servants, beyond those specially pointed out in the Prætor's edict. This responsibility seems, however, to have been limited to cases, where the principal was guilty of some negligence in employing negligent and improper agents and servants. Thus, in the Digest, the opinion of Pomponius is approved. Videamus, an et servorum culpam, et quoscunque induxerit, præstare conductor debeat? Et quatenus præstat? Utrum, ut servus noxæ dedat, an vero suo nomine teneatur? Et adversus eos, quos induxerit, utrum præstabit tantum actiones, an quasi ob propriam culpam tenebitur? Mihi ita placet, ut culpam etiam eorum, quos induxit, præstet suo nomine, esti nihil convenit, si tamen culpam in inducendis admittit, quod tales habuerit, vel suos, vel hospites. Digest, Lib. 19, tit. 2, l. 11; Pothier, Pand. Lib. 19, tit. 2, n. 30, 31. See also, Dig. Lib. 9, tit. 2, l. 29, § 9, 11; Pothier, Pand. Lib. 19, tit. 2, n. 31. See Story on Bailm. § 401; 1 Domat, B. 1, tit. 4, § 2, art. 5, 6; Id. B. 2, tit. 8, § 1, art. 1 to art. 9; Id. § 4, art. 8. Again: Qui columnam transportandem conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita id periculum præstat, si qua ipsius, eorumque, quorum opera uturetur, culpa acciderit. Culpa eutem abest, si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset. Dig. Lib. 19, tit. 2, l. 25, § 7; Pothier, Pand. Lib. 19, tit. 2, n. 32.

[1] Dig. Lib. 4, tit. 9, l. 1; Pothier, Pand. Lib. 4, tit. 9, n. 1, 2; 1 Domat, B. 1, tit. 16, § 1, art. 2, 4, 6; Id. § 2, art. 2; Id. § 3, art. 1, 2, 3; Heinec. ad Pand. Lib. 4, tit. 8, § 546, 547, 548, 551.

[2] Story on Agency, § 318, and note (2); 1 Domat, B. 1, tit. 16, § 1, art. 7.

[3] Dig. Lib. 4, tit. 9, l. 1, § 2; Pothier, Pand. Lib. 4, tit. 9, note (2); Story on Agency, § 318, note (2); 1 Domat, B. 1, tit. 16, § 1, art. 5.

The liability of the principal for the acts and negligences of his agents, as well as for his own, is fully proclaimed in the comments of the Roman law. Thus, for example, it is said, as to the owners or employers of ships: *Sunt quidam in navibus, qui custodiæ gratia navibus præponuntur, id est, navium custodes et dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem; quia is, qui eos hujusmodi officio præponit, committi eis permittit.*[1] The same doctrine is also applied to innkeepers. *Corpo præstat factum eorum, qui in ea caupona, ejus cauponæ exercendæ causa ibi sunt. Item eorum, qui habitandi causa ibi sunt. Viatorem autem factum non præstat.*[2] The same doctrine is also applied to stable-keepers. *Caupones autem et stabularios æque eos accipiemus, qui cauponam vel stabulum exercent, Institoresve eorum.*[3] *Eodem modo tenentur caupones et stabularii, quo exercentes negotium suum recipiunt.*[4] And the whole doctrine is summed up in another passage, where it treats of the liability of such principals for the frauds, deceits, and thefts of their agents or servants, without their knowledge. *Item exercitor navis, aut cauponæ, aut stabuli, de dolo aut furto, quod in navi, aut caupona, aut stabulo, factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicujus eorum, quorum opera navem, aut caponam, aut stabulum exercet. Cum enim neque ex maleficio, neque ex contractu, sit adversus eum constituta hæc*

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[1] Dig. Lib. 4, tit. 9, l. 1, § 3; Pothier, Pand. Lib. 4, tit. 9, note (2); 1 Domat, B. 1, tit. 16, § 2, art. 1, 2, 3, 4.

[2] Dig. Lib. 47, tit. 5, l. 1, § 6; Pothier, Pand. Lib. 47, tit. 5, n. 3; 1 Domat, B. 1, tit. 16, § 1, art. 3, 6.

[3] Dig. Lib. 4, tit. 9, l. 1, § 5; Pothier, Pand. Lib. 4, tit. 9, n. 2; 1 Domat, B. 1, tit. 16, § 1, art. 3.

[4] Dig. Lib. 4, tit. 9, l. 3, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 3.

actio, et aliquatenus culpæ reus est, quod opera malorum hominum uteretur; ideo, quasi ex maleficio, teneri videtur.[1] Here we have the rule of the liability of owners and employers of ships and stable-keepers, and the reason for it. They are responsible for the tort and fraud of their agents and servants, although they are not parties to it, *quasi ex maleficio*, as if they themselves were wrongdoers; because they have made use of the services of such bad agents and servants in their employment.

§ 460. And here, again, the like limitations to this liability were recognized in the Roman law, as exist in ours. The principal was not liable for the torts or negligences of his agents or servants, except in cases within the scope of their employment. Thus, for example, the innkeeper was liable only for the torts, or thefts, or damages, of his servants, done or committed in his inn, or about the business thereof; and not for such torts or thefts committed in other places. *Eodem modo tenentur caupones et stabularii, quo exercentes nego-*

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[1] Inst. Lib. 4, tit. 5, § 3; 1 Domat, B. 1, tit. 16, § 1, art. 7; Id. § 2, art. 1, 2, 3, 4.— The same rule is laid down in the Digest. In eos, qui naves, caupones, stabula exercebunt, si quid a quoque eorum, quosve ibi habebunt, furtum factum esse dicetur, judicium datur; sive furtum ope, consilio exercitoris, factum sit; sive eorum cujus, qui in ea navi naviganda causa esset. Navigandi autem causa accipere debemus eos, qui adhibentur, ut navis naviget, hoc est, nautas. Dig. Lib. 47, tit. 5; Introd. and l. 1; Pothier in Pand. Lib. 47, tit. 5, n. 1, 3. Quæcunque de furto diximus, eadem et de damno debent intelligi. Non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recedere videatur. Dig. Lib. 4, tit. 9, l. 5, § 1; Pothier, Pand. Lib. 4, tit. 9, n. 8; Dig. Lib. 14, tit. 1, l. 1, § 2; Pothier, Pand. Lib. 14, tit. 1, n. 6; Heinec. Pand. Ps. 1, Lib. 4, tit. 8, § 551, 552, 553, 554; Story on Bailm. § 464 to 468; Ersk. Instit. B. 3, tit. 1, § 28, 29; Id. B. 3, tit. 3, § 43 to 45; 1 Bell, Comm. B. 3, ch. 4, § 5, p. 465 to 476, 5th edit.; 1 Domat, B. 1, tit. 16, Introd.; Story on Bailm. § 401.

tium suum recipiunt. Cæterum, si extra negotium receperint, non tenebuntur.[1] So, the owner or employer of a ship was not liable for the torts, or thefts, or damages, of the mariners, unless done or committed in the ship, or about the business thereof. *Debet exercitor omnium nautarum suorum, sive liberi, sive servi, factum præstare. Nec immerito factum eorum præstat, cum ipse eos suo periculo adhibuerit. Sed non alias præstat, quam si in ipsa nave damnum datum sit. Cæterum, si extra navem, licet à nautis, non præstabit.*[2]

§ 461. Similar principles were applied in the Roman law to the ordinary agents employed in the common business of trade and commerce, called Institores;[3] and also in the case of domestic servants and persons belonging to the family. *Prætor ait de his, qui dejecerint, vel effuderint. Unde in eum locum, quo vulgo iter fiet, vel in quo consistetur, dejectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum judicium dabo.*[4] *Si servus, insciente domino, fecisse dicetur, in judicio adjiciam, aut noxam dedere.*[5] These seem to be the most important cases, specially and positively provided for in the Roman law. That law does not seem to have recog-

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[1] Dig. Lib. 4, tit. 9, l. 3, § 2; Pothier, Pand. Lib. 4, tit. 9, n. 3.

[2] Dig. Lib. 4, tit. 9, l. 7; Pothier, Pand. Lib. 48, tit. 5, n. 1; 1 Domat, B. 1, tit. 16, § 1, art. 7; Id. § 2, art. 1, 2, 3, 4.

[3] Story on Agency, § 8; 1 Domat, B. 1, tit. 16, § 3, art. 1; Dig. Lib. 14, tit. 3, l. 5, § 1 to 9; Pothier on Oblig. n. 121, 453, by Evans; Id. in French edit. n. 121, 489.

[4] Dig. Lib. 9, tit. 3, l. 1; Id. l. 27, § 11; 1 Black. Comm. 431; Inst. Lib. 4, tit. 5, § 1; Ersk. Instit. B. 3. tit. 3, § 46; Dig. Lib. 19, tit. 2, l. 11; 1 Domat, B. 2, tit. 8, § 1, art. 1 to 9.

[5] Dig. Lib. 9, tit. 3, l. 1; Pothier, Pand. Lib. 9, tit. 3, n. 1; Inst. Lib. 4, tit. 5, § 1, 2.

nized, to the full extent, the general maxim, *Respondeat Superior*, inculcated by our law.[1]

§ 462. The modern nations of continental Europe have adopted the doctrine of the Roman law to its full extent, and some of them, at least, seem to have carried it further. Pothier lays down the rule in the following broad terms: "Not only is the person, who has committed the injury, or been guilty of the negligence, obliged to repair the damage, which it has occasioned; those who have any person under their authority, such as fathers, mothers, tutors, preceptors, are subject to this obligation, in respect of the acts of those who are under them, when committed in their presence, and generally when they could prevent such

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1 See 1 Stair's Inst. B. 1, tit. 13, § 3; Story on Agency, § 454, n. 1.— Mr. Holt, in a passage cited in Story on Agency, § 454, n. 1, says, that, "In the civil law the liability was narrowed to the person standing in the relation of a pater-familias to the wrongdoer." It is also observable, that Mr. Le Blanc and Mr. Marshall, in arguing the case of Bush *v.* Steinman (1 Bos. & Pull. 405), assert, that "the liability of the principal to answer for his agent is founded in the superintendence and control which he is supposed to have over them (citing 1 Black. Comm. 431). In the civil law, that liability was confined to the person standing in the relation of pater-familias to the person doing the injury." For which they cite Inst. Lib. 4, tit. 5, § 1, and Dig. Lib. 9, tit. 3. These citations clearly prove, that the pater-familias is liable for the wrongful acts and negligences of his domestics; but they do not prove, negatively, that other persons were not liable, as principals, in any other cases, for the wrongs and faults of their agent. The text shows, that in many other cases, besides that of a pater-familias, the principal was in the civil law liable for such wrongs and faults. The learned counsel seem to have misunderstood the true meaning of the text of Blackstone's Commentaries, which by no means insists upon any such limitations. Mr. Justice Heath, in the same case, seems to have entertained the notion, that the Roman law was or might be as limited as the learned counsel supposed. But he added: "Whatever may be the doctrine of the civil law, it is perfectly clear, that our law carries such liability much further." s. c. 1 Bos. & Pull. 409. See also Story on Bailm. § 464 to 459.

acts, and have not done so. But if they could not prevent it, then they are not liable: *Nullum crimen patitur is, qui non prohibet, quum prohibere non potest.* (*l.* 109, *ff. de reg. jur.*) Even when the act is committed in their sight, and with their knowledge; *Culpa caret, qui scit, sed prohibere non potest.* (*l.* 50, *ff. d. t.*) Masters are also answerable for the injury occasioned by the wrongs and negligences of their servants. They are even so, when they have no power to prevent them, provided such wrongs or injuries are committed in the exercise of the functions, in which the servants are employed by their masters, although in the master's absence. This has been established, to render masters careful in the choice of those whom they employ. With regard to their wrongs, or neglects not committed in these functions, the masters are not responsible."[1] The doctrine of the Roman law seems to be followed with more scrupulous exactness in the laws of Spain[2] and Scotland,[3] where the specific enumerations of the Roman law are to be found followed out in treating of the liability of principals for the acts of their agents.[4]

§ 463. These are the most material considerations, which seem necessary to be prestented to the learned reader in order to illustrate the leading distinctions be-

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[1] Pothier on Oblig. by Evans, n. 121, 453; in the French edit. n. 121, 489.

[2] 2 Moreau & Carleton, Partidas 5, tit. 8, l. 26, p. 743; Story on Bailm. § 465 to 468.

[3] Ersk. Inst. B. 3, tit. 3, § 43 to 46; 2 Bell, Comm. § 398 to 406, 4th edit.; 1 Stair, Inst. B. 1, tit. 13, § 3.

[4] These last four sections are copied literally from Story on Agency, § 458 to 461. The object in reinserting them here is the desire to make each work independent of the other; and it seems indispensable to a full exposition of this branch of the subject, to present the Roman and foreign law with fulness and exactness.

tween cases of partnership, and cases of part-ownership. And, here, these Commentaries, according to their original design, are brought to their appropriate conclusion. In reviewing the whole subject of partnership, it cannot escape the attention of any careful observer, how many of the doctrines of the jurisprudence of the common law are coincident with those of the Roman law, and those of the modern commercial nations of continental Europe. This circumstance affords no slight proof, that they are essentially founded in the principles of general justice, sound policy, and public convenience. If it should be objected, that the common law on this subject contains some very subtle, artificial, and even arbitrary doctrines, having no just foundation in an enlarged and liberal equity, and not susceptible of any satisfactory vindication, except as mere positive or technical rules, the same objection lies, at least to an equal extent, against the system of the Roman law upon the same subject, and the jurisprudence of modern Europe, built upon it. In truth, it is impracticable to establish any universal rules, which shall equally suit the habits and institutions, the policy, and the various employments of all commercial nations. Every branch of municipal law must have a close affinity to all others, belonging to the same common system, which attempts to regulate and enforce the rights, the liabilities, and the remedies by and against particular persons in their various social relations. The positive and technical rules, applicable to one branch, must in a great measure pervade the whole, in order to make the administration of justice by the public tribunals at once safe, easy, certain, and satisfactory. It would, therefore, be a matter of wonder, if in the diversities of pursuits, of occupations, of interests, and even of political arrangements, in different countries, we

should not find ingrafted upon each system some peculiarities, which, in a philosophical sense, might seem to be either incongruities or defects. Human wisdom never yet has achieved any thing perfect; and the most, that can be expected from the most enlightened jurisprudence, is, that it shall contain within itself near approximations to the soundest equity and moral justice, and in its adaptations be fitted to the wants, the spirit, and the policy of the age. In this respect the common law, especially in the department of commercial jurisprudence, which has grown up and expanded with the increasing intercourse between different nations, and the enterprise, and skill, and necessities of navigation and trade, may justly challenge competition with any other system in ancient or in modern times. It has been nourished by the genius, and learning, and independence of Judges, whose labors, like those of Ulpian, and Gaius, and Paul, and Papinian, are destined to the same immortality as the Law itself. Its highest praise is, that its principles receive an almost universal homage, not as the positive dictates of authority, but as the persuasive and irresistible influence of reason. *Valent pro ratione, non pro introducto jure.*

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